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R E P O R T S
OF
DECISIONS
IN
THE SUPREME COURT
OF
THE UNITED STATES.

WITH NOTES, AND A DIGEST.

By B. R. CURTIS,
ONE OF THE ASSOCIATE JUSTICES OF THE COURT.

VOL. XV.

FIFTH EDITION,
REVISED WITH REFERENCE TO THE LATEST DECISIONS.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1870.

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of the District Court of the District of Massachusetts.

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D E C I S I O N S
OF THE
SUPREME COURT OF THE UNITED STATES.
JANUARY TERM, 1844.

JUDGES DURING THE TIME OF THESE REPORTS.

<p>HON. ROGER B. TANEY,¹ CHIEF JUSTICE. HON. JOSEPH STORY, HON. JOHN M'LEAN, HON. HENRY BALDWIN, HON. JAMES M. WAYNE, HON. JOHN CATRON, HON. JOHN M'KINLEY, AND HON. PETER V. DANIEL, JOHN NELSON, Esq., ATTORNEY-GENERAL. WILLIAM THOMAS CARROLL, Esq., CLERK. BENJAMIN C. HOWARD, Esq., REPORTER. ALEXANDER HUNTER, Esq., MARSHAL.</p>	}	<p>ASSOCIATE JUSTICES.</p>
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ALEXANDER G. M'NUTT, Governor of Mississippi, who sues for the use of LEGGETT, SMITH, and LAWRENCE, v. RICHARD J. BLAND and BENJAMIN G. HUMPHREYS.

2 H. 9.

The circuit court has jurisdiction, under the 11th section of the Judiciary Act of 1789, (1 Stats. at Large, 78,) of a suit in the name of the governor of a State, on a sheriff's bond to the governor, if the parties beneficially interested in that suit be citizens of another State and competent to sue the defendant.

The act of the State of Mississippi, granting the use of its jails to the United States, was intended to be in conformity with the resolution of congress on that subject, of September 23, 1789, (1 Stats. at Large, 96,) and consequently prisoners of the United States could be discharged only by due course of the laws of the United States.

¹ The Chief Justice was attacked, very early in the session, by a severe indisposition, which rendered him unable to take his seat upon the bench during the remainder of the term.

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The discharge of a debtor committed on an execution out of a circuit court of the United States, for non-payment of prison fees, under the authority of a state law or by a state officer under a state insolvent law was not legal.

If one defendant in error die, before the term begins, and the cause of action survives, the death may be suggested and judgment taken against the survivor.

ERROR to the circuit court of the United States for the southern district of Mississippi, in an action of debt upon a sheriff's bond, instituted by Leggett, Smith, and Lawrence, citizens of New York, in the name of the plaintiff in error, to whom, as governor of the State, the bond was given pursuant to a statute of the State.

The breach assigned was that Bland, the sheriff, discharged from his custody, one M'Nider, who had been committed to the sheriff's custody in jail by the marshal of the United States, on an execution in favor of Leggett, Smith, and Lawrence, out of the circuit court of the United States.

The defendants pleaded: 1. That the prisoner was discharged pursuant to a statute of the State, for non-payment by the creditors of the prison fees: and 2. That he had been regularly discharged from imprisonment, as an insolvent debtor, by a judge of probate, pursuant to the laws of the State for the relief of insolvent debtors.

To the first of these pleas the plaintiff replied that they had an agent residing in Mississippi, and no notice was given to him, and to the second that the discharge was not pursuant to any act of congress, and that the debtor was imprisoned under an execution issuing from a circuit court of the United States.

The defendants demurred to both these replications, and the circuit court rendered a judgment in favor of the defendants.

Jones, for the plaintiff.

Walker, contra.

[*13] * BALDWIN, J., delivered the opinion of the court.

As the judgment below was rendered on a general demurrer, it is necessary to ascertain in what part of the pleadings the first demurrable defect occurred, which the defendant here alleges was in the declaration, inasmuch as it appears that the plaintiffs and defendants were citizens of Mississippi, and consequently the court below had not jurisdiction of the case.

By the law of that State, How. & Hut. 290, 291, all sheriffs must give a bond to the governor of the State for the time being, and his successors, conditioned for the faithful performance of the duties of his office; which bond may be put in suit and prosecuted from time

to time at the costs and charges of any party injured, until the whole amount of the penalty thereof be recovered. This suit was accordingly brought in the name of the governor, for the use of Leggett, Smith, and Lawrence, citizens of New York.

The parties in interest, therefore, had a right to sue the defendants in the circuit court in their own names, by a bill in equity in an appropriate use, or by an action of debt, or for an escape against the sheriff himself, as in *Darst v. Duncan*, 1 How. 301, if he made out a cause of action in either form, and we can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the governor, who is a purely naked trustee for any party injured. * He is a mere conduit through whom the law [* 14] affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a circuit court of the United States, in any other mode of proceeding than on the sheriff's bond.

It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other States should be deprived of the right of suit on sheriffs' bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the governor for the use of the plaintiffs in *mesne* or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. The constitution extends the judicial power to controversies between citizens of different States; the 11th section of the Judiciary Act gives jurisdiction to the circuit courts, of suits between a citizen of the State where the suit is brought, and a citizen of another State. In this case, there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the constitution or law can he be considered as a litigant party; both look to things not names, to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law.

This court must have acted on these principles in *Browne et al. v. Strode*, 5 Cranch, 303, which was a suit on an administration bond of an executor, for the faithful execution of the testator's will, in

conformity with a law of Virginia, 5 Hen. st. 461, which requires all such bonds to be payable to the justices of the county court, where administration is granted, but may be put in suit and prosecuted by, and at the costs of the party injured. The object of that suit was to recover a debt due by the testator to a British subject; the defendant was a citizen of Virginia; the persons named in the declaration as plaintiffs were the justices of the county, who were also citizens of Virginia, yet it was held that the circuit court of that State had jurisdiction. We are aware of no subsequent decision of this court,

which in the least impairs the authority of that case, or [* 15] contravenes the principle * on which it was decided; that where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in, or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists.

Executors and administrators are not in this position, they are the actors in suits brought by them; the personal property of the decedent is vested in them; the persons to whom they are accountable, for whose benefit they act, can bring no suit to assert their rights against third persons, be the cause of action what it may; nor can they interfere with the conducting of the suit to assert their rights to the property of the decedent, which do not vest in them. The personal representative is, therefore, the real party in interest before the court, 12 Pet. 171, and succeeds to all the rights of those they represent, by operation of law; and no other persons are capable, as representatives of the personalty, of suing or being sued. They are contradistinguished, therefore, from assignees who claim by the act of the parties, and may sue in the federal courts in cases where the decedent could not. 8 Wheat. 668; 4 Cranch, 308, S. P. By the 11th section of the Judiciary Act, assignees cannot sue where the assignor could not, nor can they sue in their own names if the assignor could, unless the assignees were aliens or citizens of another State than that of the defendant, and the instrument sued on was so assigned as to vest the right of action in the assignees, in which latter case, the suit must be by the party originally entitled to sue. Thus, where the payee of a promissory note, which was neither negotiable nor assignable, so as to sustain an action by the assignees, sued for the use of a corporation incapable of suing in the federal courts, this court held that the circuit court had jurisdiction, on the ground that the suit was on a contract between the plaintiff and defendant. The legal right of acting being in the plaintiff, it mattered

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not for whose use the suit was brought, the parties being citizens of different States. *Irvine v. Lowry*, 14 Pet. 298. In that case, the decision in 5 Cranch was reviewed and affirmed; and as it is in all respects analogous to, it must govern this and similar cases, where the cause of action is not founded on a contract between the parties or their legal representatives.

The objection to the jurisdiction cannot, therefore, be sustained.

* The next question arises on the defendants' first plea in [*16] bar, which sets up a discharge of the prisoner by the sheriff, in default of the plaintiff in the execution paying the prison fees due, pursuant to the act of 22d June, 1822, §§ 35, 47; *Hut. & How.* 640-644.

This law, by its own force, cannot apply to persons committed on executions from the courts of the United States, it must first be adopted by act of congress, or some rule of court under the authority conferred on the courts of the United States by law. It is a peculiar municipal regulation, applicable and intended to apply only to persons committed under state process, as clearly appears by the 62d section of the same law, in the revised code, as to process of the United States. *How. & Hut.* 649, 650. After reciting in full the resolution of congress relating to jails, passed in 1789, 1 Story, 70, it proceeds: "And whereas it is just and reasonable to aid the United States therein, on the terms aforesaid, until other provisions shall be made in the premises, it is enacted, That all sheriffs, &c., within this State, to whom any person or persons shall be sent or committed by virtue of legal process, issued by or under the authority of the United States, shall be, and are hereby required to receive such prisoners into custody, and to keep the same safely until they shall be discharged by due course of law, and be liable to the same pains and penalties, and the parties aggrieved be entitled to the same remedies, as if such prisoners had been committed under the authority of the State. The sheriff may require of the marshal the fulfilment of the proposals of the general government, with regard to rent and sustenance, at least quarter yearly; and on the discharge of the prisoner shall make a statement of charges, &c., to enable him to make his return to the proper department of the general government."

Taking this section of the law in connection with the resolution of 1789, there appears an evident intention in the legislature, that the law should cover the whole resolution, so as to carry it into effect in all its parts and provisions. Hence the terms in each must be made to harmonize; whereby the phrase in the 62d section, "and to keep the same safely until they shall be discharged by due course of law,"

will be referred to the corresponding phrase in the resolution, "until they shall be discharged by due course of the law thereof," (the United States,) so as to authorize no discharge by virtue of any state law, incompatible with the resolution. If any doubt could arise on these words in the resolution, "all prisoners committed under the authority of the United States," whether they applied to [* 17] cases * between individuals, it is removed by the explicit language of the law, "any person or persons who shall be sent or committed by virtue of legal process, issued by, or under the authority of the United States," &c., "and the parties aggrieved shall be entitled to the same remedies," &c., which necessarily embrace all cases, civil or criminal.

As it would be wholly inconsistent with this view of the resolution and law, for the legislature to authorize the sheriff to discharge any person from custody, otherwise than by the due course of the laws of the United States, we cannot attribute such an intention to them, unless the words of their act clearly indicate it; but there is nothing in the act to that effect, or any words which admit of such construction. On the contrary, as the resolution of congress positively requires it, as the preamble to the state law declares it to be "just and reasonable to aid the United States therein," the enacting part must be taken accordingly, otherwise the law would conflict with the resolution.

The act of congress passed in 1800,¹ provides for the mode of discharging insolvent debtors, committed under process from the courts of the United States, and the cases in which it may be done it is obligatory on the sheriffs in every county of the States who have acceded to the resolution of 1789, and no discharge under any state law not adopted by congress, or a rule of court, can exonerate the officer. *Vide* 1 Story, 715; 3 Story, 1932,² 1939;³ *Suydam v. Broadnax*, 14 Pet. 75; 10 Wheat. 36, 37. From the time of *Palmer and Allen*, 7 Cranch, 554, to *Darst v. Duncan*, 1 H. 301, the language and decisions of this court have been uniform for more than 40 years, that a state law, which is "a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint on state officers in the execution of the process of their courts, is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them. By the process acts of 1789,⁴ 1792,⁵ and 1828,⁶ congress have adopted such state laws as prescribe the modes of process and proceedings in suits at common law, as are not in conflict with the laws of the United States,

¹ 2 Stats. at Large, 4. ² 4 Ib. 1. ³ Ib. 19. ⁴ 1 Ib. 93. ⁵ Ib. 275. ⁶ 4 Ib. 278.

which can be executed by the courts of the United States; which impose no restraint on, or obstruction of their process from its inception till ultimate satisfaction from the defendant, or the marshal, sheriff, or other officer, intrusted with its execution." 2 Pet. 525; 10 Wheat. 40, 56, &c. "Congress, however, did not intend * to defeat the execution of judgments rendered in the courts [* 18] of the United States, but meant they should have full effect by force of the state laws adopted, and therefore all state laws regulating proceedings affecting insolvent persons," or that are addressed to state courts or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. 1 How. 306; 14 Pet. 74, S. P. For these reasons we are of opinion that the defendants' first plea is defective, in not setting forth a case which justifies the discharge of the person committed on the execution.

The second plea sets up a discharge of the prisoner pursuant to the laws of Mississippi, as an insolvent debtor, by order of a judge of probate, which presents a case covered by the decision of this court in *Darst v. Duncan*, that such a discharge by a sheriff was no defence to an action of debt for an escape. 1 How. 304. The judgment of the court below must therefore be reversed, and judgment rendered for the plaintiff.

DANIEL, J., dissented.

From the opinion just pronounced on the part of the court in this cause, I am constrained to differ. Although it ever must be with unaffected diffidence that I shall find myself opposed to a majority of my brethren, still, a feeling like that just adverted to, should not, and properly cannot, induce in me a relinquishment of conclusions formed from examinations carefully made, and upon decisions which appear to be distinctly, as they have been repeatedly announced. My opinion is, that the judgment of the circuit court against the plaintiff below ought to be affirmed, for the reason that the court could not properly take cognizance of his cause. Under systems of polity compounded as are the federal and state governments of this Union, instances of conflicting power and jurisdiction, real or apparent, will frequently arise, and will sometimes run into niceties calculated to perplex the most astute and practised expositors. For myself, I must believe that the surest preventive of such instances, their safest and most effectual remedy when they shall occur, will be found in an adherence to limits which language in its generally received acceptation prescribes, and in shunning not merely that which such acceptation may palpably forbid, but, as far as possible, what-

ever is ambiguous or artificial. In adopting or commending the rule thus indicated, I undertake to propound no new principle [* 19] of * construction to this court, to essay no innovation upon its doctrines. I plant myself, on the contrary, upon its oft repeated decisions, and invoke their protection for the interpretation now insisted upon.

The action in the circuit court was instituted in the name of Alexander McNutt, governor of the State of Mississippi, (who was the successor of Charles Lynch,) who sues for the use of Thomas Leggett and others, citizens of the State of New York, against Bland, Humphreys, and Geissen, citizens of the State of Mississippi. It was founded on a bond executed by Bland, a sheriff of the county of Claiborne, in the State above mentioned. The pleadings, so far as they relate to the conduct of the sheriff in fulfilment of his duties, or in dereliction thereof, are irrelevant to the question here raised, and need not therefore be examined. The proper question for consideration here is this; whether upon the case as presented upon the declaration, the circuit court of Mississippi could take jurisdiction. McNutt is the party plaintiff upon the record, in whom is the legal right of action. Leggett and others, who are said to be the beneficiaries in the suit, and in whom is the equitable interest, are not the legal parties to the suit at law, and could not maintain an action upon the bond to which they were not parties.

Is McNutt to be considered as suing in his private individual character, and the addition "governor of the State of Mississippi," to be regarded as merely a phrase of description? Or is he to be viewed as the representative of the State of Mississippi, or rather as identified with the sovereignty of that State, and having vested in him the exercise of her executive authority? Let both branches of this inquiry be cursorily pursued. If McNutt is to be regarded as a private party to the action, whether in his own interest, or as the private agent of the State for certain purposes, it would indeed seem to be too late, and entirely supererogatory, to construct an argument to prove, that to warrant either the commencement or prosecution of a suit in his name in a circuit court of the United States, his citizenship must be averred and shown upon the record. Decisions to this effect may be said to have been piled upon the question, for they may be traced from a period coeval almost with the passage of the Judicial Act, down to a comparatively recent day; ranging through at least ten volumes of the decisions of this court; and ruling, it is believed without an exception, that wherever jurisdiction is to be claimed from the citizenship or alienage of parties, such citizenship or alienage must be expressly set forth; ruling, moreover, that

wherever jurisdiction is * claimed from the character of [* 20] parties, it must be understood as meaning the parties to the record.

The first case in support of these positions, is that of *Bingham v. Cabot et al.* from 3 Dall. 382, instituted in 1797, in which the plaintiffs were styled in nar. as John Cabot, (with the co-plaintiffs,) described as being "all of our said district of Massachusetts," and as complaining that "said William, at Boston, being indebted," &c. Lee, attorney-general, insisted "that there was not a sufficient allegation in the record of the citizenship of the parties to maintain the jurisdiction of the circuit court, which is of limited jurisdiction." Dexter, on the other hand, urged "that, stating in the declaration the party to be of a particular place, designates his home, and of course his citizenship." The court were clearly of opinion, "that it was necessary to set forth the citizenship (or alienage where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the circuit court." In the year 1797, were decided in the supreme court the cases of *Turner v. Eurille*, and of *Turner, admin., &c. v. The Bank of North America*, reported in 4 Dall., the former at pp. 7 and 8, the latter on pp. 8, 9, 10, and 11. The declaration in the former case set out a demand by the Marquis de Casa Eurille, of —, in the island of —, against Stanley and the intestate of Turner and Greene, merchants and partners at Newbern in the said district. Upon objection to the jurisdiction for want of a proper description of parties — By the court: "The decision in the case of *Bingham v. Cabot et al.* must govern the present case. let the judgment be reversed, with costs." *Turner, admin. of Stanley, v. The Bank of North America*, was an action upon a promissory note drawn at Philadelphia by Stanley, indorsed by Biddle and Company to the Bank of North America. The nar. stated that the president and directors were citizens of the State of Pennsylvania, that Turner, the administrator, and Stanley, the intestate, were citizens of the State of North Carolina; but of Biddle and Company, the payers and indorsers; there was no other description than "that they used trade and merchandise at Philadelphia or North Carolina." Ellsworth, chief justice, in delivering the opinion of the court, after remarking that the Bank of North America, as well as the drawer of the note, was properly described, proceeds thus: "The error assigned is, that it does not appear from the record that Biddle and Company, the promisees, or any of them, are citizens of a State other than that of North Carolina. The circuit court, though an inferior * court, in the language of the constitu- [* 21] tion, is not so in the language of the common law. A cir-

cuit court, however, is of limited jurisdiction, and has cognizance not of cases generally, but only of a few specially circumstanced; and a fair presumption is, not (as with regard to a court of general jurisdiction) that a cause is within its jurisdiction, unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears. This renders it necessary to set forth, upon the record of a circuit court, the facts and circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant is a citizen of one State, to show that the plaintiff is a citizen of some other State, or an alien. Here the description of the promisee only is, that he used trade at Philadelphia or North Carolina, which contains no averment that he was a citizen of a State other than North Carolina, or an alien. We must, therefore, say there was error." In *Mossman v. Higginson*, 4 Dall. 14, the same doctrine is affirmed, and the court conclude their opinion with the following explicit language: "Neither the constitution, nor the act of congress, regards, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description." The case of *Course et al. v. Stead et ux.* 4 Dall. 22, is marked by one trait which peculiarly illustrates and enforces the principle ruled in the cases previously cited. In this last case, a supplemental bill was filed making a new party to a suit previously pending, but in the supplemental bill no description of the citizenship of this new defendant was given; the absence of such description having been assigned for error, it was contended that such a description was not necessary in the supplemental suit, which is merely an incident of the original bill brought in the same court; but the supreme court sustained the objection, and reversed the decree of the circuit court, on the ground of jurisdiction. Next in the order of time is the case of *Wood v. Wagon*, 2 Cranch, 9, where the statement in the pleadings was, that Wagon, a citizen of Pennsylvania, sheweth, that James Wood, of Georgia, &c. The judgment was reversed for the defect that the plaintiff and defendant were not shown by the pleadings to be citizens of different States.

In *Hepburn and Dundas v. Elzey*, 2 Cranch, 445, the decision turned upon a defect in the description of a party necessary [*22] to give *jurisdiction. *Winchester v. Jackson*, 3 Cranch, 514. The writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different States. In *Kemp's Lessee v. Kennedy*, this court declare that "the courts of the United States are all of limited jurisdiction,

and their proceedings are erroneous if the jurisdiction be not shown upon them." 5 Cranch, 185. The same in effect, the same indeed in terms, is the decision of this court in *Montalet v. Murray*, 4 Cranch, 46. Again, the principle that the character which authorizes access to the circuit court must be apparent upon the record is strikingly exemplified in *Chappedelaine et al. v. Dechenaux*, 4 Cranch, 306. In this case the plaintiffs were trustees, not suing in their own interest; yet, as they were aliens, and, as such, entitled to sue in the circuit courts of the United States, this court, in virtue of that character, and their title flowing therefrom apparent on the record, sustained the jurisdiction of the circuit court. Passing, with a mere mention of them, the cases of *The Hope Insurance Company v. Boardman et al.* 5 Cranch, 57; *Hodgson and Thompson v. Bowerbank et al.* 5 Cranch, 303; *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267; *The Corporation of New Orleans v. Winter*, 1 Wheat. 91, all full to the point, I will quote an emphatic and more comprehensive affirmation of Judge Washington in reference to the powers of the circuit courts, expressed in the opinion of that judge in *McCormick and Sullivant*, 10 Wheat. 199. "They are all (says he) of limited jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause." But the fullest and clearest exposition and vindication of the doctrine contended for in this opinion, will be found in the reasoning of Chief Justice Marshall, in delivering the decision in the case of *Osborn v. The Bank of the United States*. The portion of the reasoning particularly referred to commences on the 856th page of the 9th volume of Wheaton. "The judicial power of the Union," says the chief justice, "is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the *federal courts could be ousted by the fact [* 23] that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that the jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal

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than in that which has been stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record." Again he remarks, p. 857: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is of necessity limited to those suits in which a State is a party on the record."

This reasoning of the late chief justice seems to meet the present case in every aspect of which it is susceptible, and to dispel every shade of doubt that could possibly be cast upon it. The doctrine this reasoning so well sustains, is reaffirmed by the same judge, in the still later case of *The State of Georgia v. Juan Madrazo*, 1 Pet. 122; and amongst other authorities there cited, the principles ruled as above mentioned in *Osborne v. The Bank of the United States* are referred to and approved. *Vide* also *Keary et al. v. The Farmers and Mechanics' Bank of Memphis*, 16 Pet. 89.

Alexander McNutt, in the case under examination, must be regarded as a private person acting in a private capacity; at most, as a mere agent under a law of Mississippi, in whom the interests of other individuals may to a particular extent have been vested, and through whom they were authorized to sue. He represented or was identified with no political or fiscal rights or interests of the State of Mississippi. That State had no interest involved in the conducting of that suit by McNutt, and much less was she a party to the record in that suit. Standing then in the relation of a mere agent in the transaction, and there being no law of the United States investing the federal courts with jurisdiction as incident to such agency, he could have access to those courts, and the courts themselves could have jurisdiction, solely in virtue of his character of citizen of a [* 24] State different from that in * which the defendants resided, and that character it was indispensable should appear upon the record. These are positions which it has seemed to me impossible successfully to assail; positions encompassed with a chain of authorities comprehending the entire existence and duration of the government itself. This, however, is said to have been broken by the act of this court, and by that act an opening made for further power and jurisdiction in the circuit courts. The means by which such important consequences are supposed to have been effected, is the decision of the case of *Browne et al. v. Strode*, to be found in

5 Cranch, 303. In this case, which was submitted without argument, and in which the certificate directed to the circuit court is comprised in two lines, no reason whatever is assigned for the conclusion at which the court appear to have arrived. The facts of the case, as presented in the short abstract of it, are thus stated: "It was an action upon an executor's bond given in conformity with the laws of Virginia. The object of the suit was to recover a debt due from the testator in his lifetime to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs, were the justices of the peace for the county of Stafford, and were all citizens of Virginia." The court ordered it to be certified as their opinion "that the court below has jurisdiction in the case." This is the whole case, and it is confidently believed to stand entirely solitary; without support, and without a likeness in the whole history of our jurisprudence; and, in commenting upon this case, it may be safely asserted, that if the court in their certificate have intended to affirm, that the holders of equitable interests, *cestui que trusts*, who are not the holders of the legal interests, or rights of action at law, are in actions at law the regular and proper parties to the record, then, indeed, they have not merely overturned the series of decisions in this court, from the case of *Bingham v. Cabot*, in 3 Dall. 382, decided in 1798, down to the case of the *Governor of Georgia v. Madrazo*, 1 Pet. 110; they have reversed, moreover, what is believed has been regarded as a canon of the law, wherever the principles of the common law have been adopted; and this they have accomplished by one short sentence, and without a single word to explain this mighty revolution. But can it be reasonably presumed that this court have in so cursory a mode intended to reverse its own well-considered, well-reasoned, and oft-repeated decisions; and this, too, without professing to review them—nay, without one word of reference to them of any kind? A *presumption like [* 25] this seems scarcely compatible with that cautious reluctance with which innovation on settled principles is always admitted by the courts. Is it not far more probable, that the short and isolated abstract in question, exhibits an imperfect picture of the action and purposes of the court as applicable to some particular state of case which may not be fully and accurately given, for the record of the case in the court below is not set out *in extenso*. But let it be supposed that the objects and the language of the court, in the case of *Browne and Strode*, are accurately given; still, the inquiry recurs, does that case establish the law of this cause at the present day? *Browne and Strode* was decided in 1809. Turning, for the moment, from the decisions of this court prior to 1809, supposed (strong, and

explicit, and numerous as they are) to have been silently demolished by Browne and Strode, 5 Cranch, 303, what must be understood with respect to the decisions of Skillern's Executors v. May's Executors, 6 Cranch, 267; of Osborne v. The Bank of the United States, 9 Wheat. 738; of McCormick v. Sullivant, 10 Wheat. 199, and of The Governor of Georgia v. Madrazo, 1 Pet. 110, all posterior in date to 1809? If these cases are to be received upon the import solely of their own terms, uninfluenced by any reference to prior decisions, still, as they are posterior in time to Browne and Strode, and are wholly irreconcilable therewith, they should be understood as controlling and reversing that decision. How much stronger then, nay how irresistible appears this conclusion, when it is ascertained that the several decisions subsequent to 1809 refer expressly to those of previous date, rely upon them as forming their own foundation, and reaffirm them as the law of the federal courts.

The only decision in this court which would appear, upon a superficial view of it, to give color to the decision of Browne *et al.* v. Strode, is the case of Irvine v. Lowry, reported in 14 Pet. 293. An attentive examination of the latter case, however, will show that, so far from resembling Browne and Strode, the facts of the two cases differ essentially, and that the former does not sustain, but, in effect, contradicts the latter. In Irvine v. Lowry, the action was in the name of Irvine, the payee of the note, for the benefit of the Lumberman's Bank. On behalf of Lowry, the defendant, exception was taken to the jurisdiction upon the ground that the Lumberman's Bank, the beneficiaries in the suit, consisted, in part, of persons who were citizens of the same State to which the defendant belonged.

The case of Browne *et al.* v. Strode was relied on to show [* 26] that these * beneficiaries and not the nominal parties or those who held the legal interest, should be considered the true parties on the record. This exception was overruled, and the jurisdiction sustained in the name of the party holding the legal right, in conformity with the current of authorities before cited. 'Tis true that, in the opinion delivered in this case, the decision in Browne *et al.* v. Strode is mentioned, and accounted for upon an hypothesis which by no means divests it of its anomalous character, any more than it rests the case of Irvine v. Lowry upon any real similitude with it. The argument is this, that although in Browne *et al.* v. Strode the plaintiffs and defendant were citizens of the same State, yet the statute of Virginia, which requires the executor's bond for the protection of creditors and legatees, passes the legal right to those whose interests the bond is designed to protect. To this reasoning several answers at once present themselves, either of which appears

to be sufficient. 1. If this could be so understood, it would leave the objection precisely where it stood before. The parties to the action would still be all citizens to the same State, whereas the judicial act declares they shall be (that is the plaintiffs and defendants) of different States. 2. The Virginia statute professes to effect no such transmutation of legal rights. 3. It confers no right of action on the beneficiaries under the bond. 4. It orders the prosecution of the suit in the names of the justices, the obligees, and by consequence, forbids such proceeding in the names of any other persons. 5. In point of fact, in the case commented on, (as doubtless would be found to be the fact in every suit ever instituted under the statute,) the action was brought in the names of the justices, so that those whose interests were designed to be protected by the bond, were never parties to the suit at all, much less the real or only parties representing the right of action under the bond.

My mind, then, is impelled, by considerations like these, to the deductions, that *Browne v. Strode*, 5 Cranch, 303, does not furnish the rule for the decision of this cause; and that, if it ever was a rule for the federal courts, it has been clearly and emphatically annulled. As a corollary from the above reasoning and the cases adduced in support thereof, it follows, that Alexander McNutt, without appearing as the party plaintiff upon the record to be a citizen of some State other than that to which the defendants belong, could have no standing in the circuit court; and that, failing so to appear, the circuit court could have no jurisdiction over the cause.

* It cannot be requisite here to meet any argument, should [*27] any be attempted, designed to maintain the right of McNutt to sue in virtue of his character of governor of Mississippi, and as such representing the sovereign or supreme executive power of that State. In that aspect, the suit would be virtually by the State herself, and not be the suit of Alexander McNutt; such a suit, too, could take place only where some direct right or interest of the State should be involved. Of such a controversy, the circuit court could unquestionably have no jurisdiction; this having been settled as one of those instances, the cognizance whereof belongs exclusively to the supreme court. *Vide The State of Georgia v. Brailsford*, 2 Dall. 402, and *The Governor of Georgia v. Madrazo*, 1 Pet. 110; *Fowler et al. v. Lindsey et al.* 3 Dall. 411.

To any argument *ab inconvenienti*, which may be urged in support of the jurisdiction in this case, I would simply oppose the observations of two distinguished members of this bench, in reply to a similar argument addressed to them in the case of *Turner, admin., &c., v. The Bank of North America*, 4 Dall. 10; in which Chief Justice

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Ellsworth inquired: "How far is it intended to carry this argument? Will it be affirmed that, in every case to which the judicial power of the United States extends, the federal courts may exercise jurisdiction without the intervention of the legislature to distribute and regulate the power?" And Chase, J., remarked: "If congress has given the power to this court, we possess it, not otherwise; and, if congress has not given the power to this or any other court, it still remains at the legislative disposal." *Est boni judicis ampliare jurisdictionem* was once quoted as a wise judicial maxim; how far this may accord with systems differently constituted from ours, and having their foundations in a large and almost undefinable discretion, it is, perhaps, unnecessary here to inquire; it seems, however, scarcely compatible with institutions under which the political and civil state is referred, almost exclusively, to legislative or express regulation.

Upon the views above given, I conclude that the judgment of the circuit court should be affirmed.

[*28] *STORY, J. The decree of the circuit court in this case was reversed on the 30th of January, 1844, and the cause remanded, with directions to enter judgment for the plaintiff. On the 31st of January, Jones, for the plaintiff in error, suggested the death of Bland, and moved that the writ of error stand against the survivor, Humphreys, and that judgment be entered against him alone.

STORY, J., in delivering the opinion of the court said, that if Bland died since the commencement of the term, the judgment might be entered against both defendants, on a day prior to the death of Bland, *nunc pro tunc*. If he died before the commencement of the term, then upon the suggestion of his death before the term being entered of record, the cause of action surviving, the judgment might be entered against the surviving defendant, Humphreys. There certainly is no objection in this case, under all the circumstances, to granting the application as asked for by the plaintiff's counsel; that is, to enter the suggestion of Bland's death upon the record, and then entering judgment against Humphreys alone, as the survivor; and it is accordingly so ordered by the court.

14 H. 586; 17 H. 478; 21 H. 66.

WILLIAM M. GWIN v. JAMES W. BREEDLOVE.

2 H. 29.

The Process Act of 1828, (4 Stats. at Large, 278,) adopted so much of the act of the State of Mississippi as authorized a judgment, by motion against a sheriff for failing to pay over

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moneys collected on execution, and this is a proceeding in the original suit, over which a circuit court there has jurisdiction, though the plaintiff and the marshal are both citizens of the same State.

The penal clauses of the act are not adopted.

If a marshal receive bank-notes in satisfaction of an execution, he is liable to the creditor for the amount in gold or silver.

ERROR to the circuit court of the United States for the southern district of Mississippi. The defendant in error having recovered a judgment in that court for a sum of money, execution issued, and the marshal having paid over to the creditor only a part of the amount, a motion was made by the creditor for a judgment against the marshal, for the balance. This motion was founded on a statute of Mississippi, passed February 15, 1828, which, among other things, * provided, (Howard and Hutchinson, 296,) that if [* 30] the sheriff should fail to pay, on demand by the plaintiff, money collected by execution, such sheriff and his sureties should be liable to pay to the plaintiff the whole amount of money so collected, together with twenty-five per cent. damages thereon, with interest at the rate of eight per cent. per annum, to be recovered by motion before the court to which such execution is made returnable. The statute further provided for a jury, if the sheriff should deny that the money was collected by him.

The reasons filed in support of the motion were, that the marshal had made the money and failed, or refused to pay it over to the plaintiff.

The pleadings and exceptions are stated in the opinion of the court. The judgment of the circuit court was against the marshal, for the balance of the debt, together with the penal interest provided for in the statute, and the marshal prosecuted this writ of error.

Walker, for Gwin, the plaintiff in error.

Coxe, for the defendant.

* CATRON, J., delivered the opinion of the court. [* 34]

The writ of error in this case is prosecuted by the former marshal to reverse a judgment recovered against him by motion in the circuit court of the United States for the district of Mississippi. The proceeding in this form, is founded on a law of that State governing sheriffs; as will be seen by the statement of the reporter.

The first objection raised on behalf of the plaintiff in error is, that it does not appear on the record that Breedlove was a citizen of a different State from the defendant; and therefore it is insisted the court below had no jurisdiction as between the parties. As this

does not appear, in an ordinary case jurisdiction would be wanting. On the other hand, it is contended that the motion against the ministerial officer of the court for not performing his duty, was an incident, and part of, the proceeding in the suit of Breedlove against Marsh and others, in which the execution issued; and that no question of jurisdiction can be raised.

The motion for a judgment being a proceeding according to the statute of Mississippi, it is also objected that congress by the act of 1806, c. 21,¹ had provided a complete and exclusive remedy on marshal's bonds by suit; but if it was otherwise; still, the additional remedy furnished by the state law when substituted, must be treated as an independent suit, in like manner as an action on the marshal's bond, and the residence of the parties be such as to give the federal court jurisdiction.

These propositions are so intimately blended that it is most convenient to consider them together.

We think it true beyond doubt, that if the bond had been proceeded on against the marshal and his sureties, it could not have been done by motion, according to the state practice prescribed by the statute of Mississippi; but that the proceeding must have [*35] been according * to the act of congress. Yet before the act of 1806 was passed, and ever since, the common law remedy by attachment has been the most usual to coerce the marshal to perform his various duties; and among others, to bring into court moneys collected on executions. So in the state courts, nothing is more common than to proceed by attachment against the sheriff, instead of resorting to a summary motion, for judgment against him by force of a statute, where he withholds moneys collected. The marshal's bond is for \$20,000; the sureties are bound to this amount only; and if no other remedy existed save on the bond, after the penalty was exhausted, he might set the court at defiance; the marshal could also be sued in *assumpsit*, by the plaintiff in the execution. It has, therefore, never been true, that a suit on his bond, governed by the acts of congress, furnished the exclusive remedy as against the marshal himself; and we think that congress intended by the new Process Act of 1828, to add the cumulative remedies, then existing by statute, in the new States, where they could be made to apply, because they were more familiar to the courts and country, and better adapted to the certain and speedy administration of justice. In our opinion, the act of Mississippi authorizing a judgment by motion, against a sheriff for failing to pay over moneys collected on execution, to the

¹ 2 Stats. at Large, 372.

party on demand, or into court at the return day, was adopted by the act of 1828, and does apply in a case like the present, as a mode of proceeding in the courts of the United States, held in the district of Mississippi; and could be enforced against the marshal in like manner it could be against a sheriff in a state court.

The same facts that justified the judgment against the goods, &c., of the marshal, would have authorized an attachment against his person; operating even more hastily than a *capias ad satisfaciendum*, founded on a judgment; and therefore no objection to this means of coercion can be perceived, that did not apply with still more force to the old mode by attachment. The latter remedy was never deemed an independent suit, but a means to compel the ministerial officer of the court to perform his duty, so that the plaintiff should have the fruits of his judgment; and the same end is attained by the new remedy under the state law; each is an incident of the suit between the plaintiff and defendant to the execution; of which the proceeding against the officer is part; and to that suit the question of jurisdiction must be referred. It follows the officer had no right to raise the question.

* The next inquiry is, to what extent does the statute of [*36 | Mississippi apply to the courts of the United States held there.

It is contended for the defendant in error, that the act of congress of 1828, did intend, and could only have intended, to adopt the state law entire; that when the process and modes of proceeding were adopted, the provision carried with it the penalties prescribed to enforce their performance; to recognize part as governing the practice of the federal courts, and reject other parts, as not applicable to them, would break up the whole system. That so doing is a delicate, and difficult duty, experience has taught us; it is impossible, however, to do otherwise in many cases. That of *Amis v. Smith*, 16 Pet. 303, was an instance. It also came up from Mississippi. By the laws of that State, the sheriff is commanded to take a forthcoming bond for the delivery of property on the day of sale, levied on by virtue of an execution; if the bond is forfeited for not delivering the property, it operates as a new judgment against the defendant to the execution, and also against the sureties to the bond; and no writ of error is afterwards allowed to reverse the original judgment. Pursuant to the laws of Mississippi, a delivery bond had been taken by the marshal; it was forfeited, and then the defendant prosecuted a writ of error to this court to reverse the judgment on which the execution issued. It was held here that that part of the state law authorizing the delivery bond to be given, was adopted by the act of 1828,

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and that a new execution might issue on it; but the part cutting off the writ of error must be rejected. Another instance will be given, which is presented by the statute of Mississippi, on which the present motion against the marshal was founded. The 27th and 28th sections enact, that if the sheriff shall make a false return on an execution or other process, to him directed, for every such offence he shall pay a fine of \$500, one half to the plaintiff, and the other half to the use of the literary fund, recoverable by motion. If the fact that the return is false does not appear of record, the court shall immediately empanel a jury to try such fact, and on its being found, proceed to assess the fine.

The recovery of the penalty, could with quite as much propriety have been on conviction by indictment as on a summary motion; and in neither mode can it be plausibly contended that the courts of the United States could inflict the penalty on its marshal; the motion and assessment of the fine, being distinct from the process and mode of proceeding in the cause of which the execution was part, [*37] *on which the false return was made. This being an offence against the state law, the courts of the State alone could punish its commission; the courts of the United States having no power to execute the penal laws of the individual States.

A judgment below for 25 per cent. damages was given against the marshal, for failing to pay over the debt collected; the penalty amounted to \$1,750. The motion for judgment was founded on the 25th section of the act; it declares judgment on motion shall be rendered against the marshal for the money collected, with legal interest; and also, for 25 per cent. damages on the amount.

This is just as much the infliction of a penalty, as if a fine had been imposed under the 27th and 28th sections for a false return, and, for the same reasons, was beyond the competency of the circuit court, and for so much the judgment cannot stand.

We next come to the question, whether the marshal is rendered liable by his return, and the proofs and pleadings.

By the state statute he was allowed to contest the fact by pleading to the motion that he had not received the money. He first demurred to the written grounds of the motion, being in the nature of a declaration. The demurrer was overruled, and the defendant had leave given to plead over. He pleaded 1st, That he did not receive or collect on said execution the moneys specified in the motion. The 2d plea is to the same effect, but for the larger sum, including a bill of exchange, about which there is no controversy.

3d. That he received and collected the notes of The Commercial and Railroad Bank of Vicksburg, and The Planters' Bank of Missis-

issippi, due and payable at said banks, and which were paying specie on their notes on demand, that is, on the 12th day of March, 1839, which notes were collected and received without any instructions from the plaintiff or his attorney that gold or silver would be required, and at a time when the bank-notes were the current circulating medium; and that the same, on the day aforesaid, were tendered to the attorney of the plaintiff before the suspension of specie payments by the banks; all of which bank-notes he has always been ready, and is yet ready and willing to pay over to the plaintiff. The 4th plea is the same in substance.

On the first two pleas issues were joined to the country: To the other two the plaintiff replied: That previous to the reception of the bank-notes, the defendant was instructed that gold and silver would be required upon the execution; and issues were tendered to the country, which were joined on the single point, [* 38] whether the marshal had been instructed that gold or silver would be required.

Two instructions were asked on behalf of the marshal, and refused—First,

“ If the jury believe from the evidence that bills of exchange and bank-notes were received by the marshal, and not gold and silver, then the jury will find the issues on the first and second pleas in favor of the defendant.”

3d. “ And that if they find that the marshal received bank-notes or bills of exchange, and not money in specie, which the plaintiff refused to receive as money, then they must find the issues for the defendant; as the issue is, whether he received and collected money, or not.”

The 2d instruction asked was given, and need not be noticed.

The return of the marshal was, that he had received on the execution bank-notes due on demand, and payable in specie, on the two banks named in the return, amounting to \$7,000, the subject of the present motion.

No question is, or can be raised, on the last two issues; they were found against the defendant on the proof that he had been instructed that nothing but gold or silver would be received in satisfaction. The merits of the case, therefore, turn on the two instructions refused; they are referable to the facts giving rise to the instructions; the facts briefly are, that the marshal was instructed to collect specie on the execution; he failed to do so, and took bank-notes from the debtor, to the amount of \$7,000, in lieu of specie. A few days after the notes were received, one of the banks at which a part of them were payable, suspended specie payments, and its notes thereby became

depreciated in value. The instructions raise the question who shall bear the loss. If the officer's return is treated as a nullity, then it will fall on Marsh and others, defendants to the execution; if the marshal's offer to deliver the notes to Breedlove's attorney, and his plea of tender had been good, then the execution creditor must have sustained the loss; but failing in these grounds of defence, the officer must bear it himself.

By the constitution of the United States, (section 10,) gold or silver coin, made current by law, can only be tendered in payment of debts; nevertheless, if the debtor pays bank-notes, which are received by the creditor in discharge of the contract, the payment is just as valid as if gold or silver had been paid. Had Marsh paid [*39] * his creditor, Breedlove, in the manner he did the marshal, then there can be no doubt Breedlove could not have treated the payment as a nullity, and on this assumption have issued an execution on his judgment, and enforced payment again in specie.

By the writ of execution, the marshal was commanded to collect so many dollars; this meant gold or silver, of course. And the court of errors and appeals of Mississippi, in the case of *Tutt v. Fulgham*, 5 How. Miss. 621, ordered the return of a sheriff, like the one before us, to be struck out, on motion of the plaintiff in the suit. That court says: "The return of the sheriff, that he took the Union bank-notes, is not a legal return; and the plaintiff is not bound by it, unless the plaintiff had agreed to receive that kind of money or notes in payment, and no such agreement appears."

In the case before us, no motion was made to strike out the return on part of the plaintiff, Breedlove, nor did the marshal ask leave to alter his return, stating he had not made the money; the three parties interested treated the payment as a valid discharge of the judgment against Marsh, and we think, for the purposes of this motion, at least, it must be so deemed. Gwin, the marshal, did receive bank-notes in payment, and intended they should be taken in discharge of the execution; the record throughout shows he did so receive them, and that they were received as money; still, he could only pay into court gold or silver, if required by the execution creditor to do so, and therefore he ran the risk of converting the notes into specie when he took them; having incurred the risk, the marshal must bear the loss of depreciation. We apprehend this view of an officer's responsibility who collects bank-notes, is in conformity to the general practice of the courts and collecting officers throughout the country.

This court, therefore, reverses so much of the judgment of the circuit court as adjudged the plaintiff in error, Gwin, to pay the twenty-five per cent. damages on the amount recovered against him; and affirms the residue of said judgment.

DANIEL, J., dissented.

I am unable to concur with the majority of the court in their opinion just announced. 'Tis my opinion that the judgment of the circuit court should have been wholly reversed.

Congress, by express enactment, have defined the duties and responsibilities of the marshals, and prescribed the modes in which • they shall be enforced. These express regulations, designed [* 40] for the government of the peculiar officers of the federal courts, cannot, I think, be varied or controlled by rules established by the States for the conduct of their respective ministerial agents, but must be of paramount authority.

The laws of Mississippi, therefore, denouncing penalties against the misconduct of sheriffs, and directing the manner of enforcing them, cannot govern this case. Should it be conceded, however, that the laws of Mississippi concerning sheriffs could have effect in this motion against the marshal, it seems obvious to my mind that the appropriate remedy under the state law for an act like that complained of, has not, in this case, been adopted. The alleged delinquency in the marshal made the foundation of this motion a delinquency identically the same for which a like proceeding is authorized against a sheriff, is the refusal to pay over money actually made and in his hands, and collected in satisfaction of an execution. For such a refusal a peculiar penalty, the very same sought and adjudged by the court in this instance, is provided. By the return of the marshal, relied on in proof by the plaintiff, it is conclusively shown that the money which the officer was commanded to make had never been received, but that he had received, in part, that which was not money, and which had never been converted into money, and which the plaintiff, in the execution, would never have received in lieu of money. Nay, the oral evidence introduced by the plaintiff was brought in to prove that the marshal, in opposition to the plaintiff's positive instructions, had received that which was not money, excluding, upon this proof as well as upon the return, every inference that money had been actually received in satisfaction of the process in his hands. A refusal or an omission to levy or to return an execution, the statutes of Mississippi designate as different and distinct offences, and the conduct of the marshal, as shown in the proofs, approaches more nearly to either of these, than it does to the misfeasance alleged in the notice, and for which the court has awarded a penalty against him, although the fact charged is positively disproved by all the testimony, as it is also by the plaintiff's replications to the defendant's third and fourth pleas. But whether or not the conduct of the marshal can in literal strictness be denominated a failure or refusal to

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levy or to return an execution, it is surely not a failure or refusal to pay over money actually levied, and, therefore, the proceeding [*41] ing, under color of the statute of Mississippi, is not *the proceeding appropriate to the act of the officer, however that act may be characterized. This is, too, a statutory proceeding, and should strictly conform to the power which authorizes it. It cannot be extended either to modes or objects not clearly embraced within the terms of that authority. It cannot, therefore, in any event, warrant the judgment now proposed, as that is clearly for a penalty wholly different from the one imposed by the law of Mississippi, for an offence such as is assumed by the court to have been committed in this instance. Surely, the law of Mississippi either should or should not govern this case.

Again, I do not think that the jurisdiction of the circuit court is made out as between the parties to the judgment. The motion on which it is founded is neither process nor a mode of proceeding in the suit between Breedlove and Marsh and Company, nor can it be deemed an execution or process or proceeding upon or regularly incident to the judgment between those parties. It is a distinct and substantive and original proceeding against a third person, no party to the controversy. A right of action is claimed against this third person for his own acts or delinquencies, independently of the contract or controversy between the parties to the judgment. In his character of officer of the court, he would, doubtless, be amenable to the authority it possesses to supervise the conduct of its own officer, and to secure the enforcement of its own judgments; an attachment would, therefore, lie against him, to effect these ends of justice. He would, also, be liable upon his official bond as marshal, because the judicial act confers a right of action thereon, without restriction as to citizenship, on all persons who may be injured by a breach of the condition of that bond. But if a further or different recourse is sought against the marshal, one which may be supposed to arise neither from the inherent power of the court over its peculiar officer, or its judgments, then it is presumed that those who seek such recourse must show their right as arising out of their character to sue in the federal courts; they must show themselves, by regular averment, to be citizens of a State other than that of him whom they seek to implead. The present case closely resembles that of *Course et al. v. Stead et ux.* 4 Dall. 22, in which it was ruled that the want of a proper description of parties in a supplemental suit, was not cured by a reference to the original suit.

The judgment should, I think, be reversed.

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DAVID SHRIVER, JUNIOR'S, LESSEE, v. MARY LYNN, WILLIAM LYNN, GEORGE LYNN, JOHN G. LYNN, JAMES C. LYNN, ELLEN JANE LYNN, MARY MAGRUDER, JONATHAN W. MAGRUDER, ANNA B. TILGHMAN, FREDERICK AUGUSTUS SCHLEY, (who married with FRANCINA C. LYNN, deceased, Daughter of DAVID LYNN,) FREDERICK AUGUSTUS SCHLEY, WILLIAM HENRY SCHLEY, and ELIZA M. SCHLEY, (Children of FREDERICK A. SCHLEY and FRANCINA his Wife,) Devisees of DAVID LYNN.

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A devise to E. M. during his natural life, and in case he should have heirs lawfully begotten of him, then to him, his heirs and assigns; but if he should die without such an heir, the land to be sold, &c., gives to E. M. only an estate for life, to be enlarged into a fee on the happening of the contingency, according to the laws of Maryland.

A trustee, appointed by the chancellor of Maryland to sell one parcel of land, sold that, and subsequently sold another parcel, which was not embraced in the decree, and reported the latter sale to the court, and it was confirmed; *Held*, that there was no authority to make the sale, and that the order of confirmation did not render it valid.

ERROR to the circuit court of the United States for the District of Maryland, in an action of ejectment brought in that court by the plaintiff in error. The material facts appear in the opinion of the court.

Johnson, for the plaintiffs.

Schley, contra.

* M'LEAN J., delivered the opinion of the court. [* 53]

This case comes up on a writ of error to the circuit court for the district of Maryland. An action of ejectment was commenced by the lessor of the plaintiff, to recover the possession of 100 acres of land, part of a tract called George's Adventure, situated near the town of Cumberland. In the circuit court, a verdict was found for the plaintiff, subject to the opinion of the court upon a cause stated. A judgment was entered for the defendant; and the cause is now before us, on the facts agreed.

By his last will and testament, Zachariah Magruder, a citizen of Maryland, among other things, devised to his wife Sarah, "the full use of his dwelling-plantation, containing in the whole, after a certain legacy was deducted, about 356 acres, called George's Adventure, in Washington county; to be by her peaceably and quietly possessed and enjoyed without molestation, during her natural life."

The will also contained the following: "I give and bequeathe unto my brother, Elias Magruder, during his natural life, 100 acres of

land, being part of a tract of land called George's Adventure, lying and being in Washington county and State aforesaid; to be laid off at the upper end of the tract aforesaid, so as to include the plantation on which he now lives. In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeathe the 100 acres of land aforesaid to him, the said Elias Magruder, his heirs and assigns, forever; but should he, the said Elias Magruder, die without an heir so begotten, I give, bequeathe, devise, and desire, that the 100 acres of land aforesaid be sold to the highest bidder, and the money arising from the sale thereof to be equally divided among my six following children, to wit: Samuel," &c. The testator having died, proof was made of his will, and letters testamentary were granted, the 3d of May, 1796, to Sarah Magruder, his wife, and his son Nathaniel B. Magruder, named as executrix and executor in the will.

After the decease of the testator, Elias Magruder took [* 54] possession * of the 100 acres of land devised to him, and being so in possession he conveyed the tract to David Lynn, who devised the same to the present defendants.

On the 30th of December, 1805, Samuel B. Magruder, and three other brothers, sons of Zachariah Magruder, filed their petition to the chancellor of Maryland, representing that their father after making particular dispositions of property, devised that the remaining part of his land, called George's Adventure, being about 356 acres, should be sold to the highest bidder, by and at the discretion of his executrix and executor, and the money equally divided amongst his six children, including the petitioners."

The petitioners stated that the executrix was deceased, and that Nathaniel B. Magruder, being insolvent, at the instance of his sureties, his power as executor had been revoked by the orphans' court. And the petitioners prayed that a trustee might be appointed "to sell all the property devised to be sold by the will, and such other and further relief," &c. The will was filed as an exhibit.

On the day of filing the petition, the chancellor decreed, "that the real estate in the said will directed to be sold shall be sold; that Roger Perry be appointed trustee, who shall give bond in \$2,000, conditioned for the faithful performance of the trust reposed in him by the decree, or to be reposed in him by any future decree or order in the premises, and that he shall proceed to sell," &c.

Afterwards on the 22d of May, 1806, the trustee reported that he "had sold the real estate in the said will and decree mentioned," and had made distribution, &c. At the close of his report he says, "the 100 acres, part of the said tract, devised to be sold in case Elias

Magruder should die without heirs, as expressed in the will, still remains unsold." The sale was ratified by the chancellor.

And afterwards, on the 9th of June, 1812, the trustee made a second report, that he "had sold the remaining part of the real estate of Zachariah Magruder, deceased, consisting of 100 acres of land," &c. This sale was also ratified by the chancellor, and a deed was executed to Walter Slicer, the purchaser. In the year 1818, a judgment was obtained against Walter Slicer, and two others in the year 1819. On one of the junior judgments execution was issued, under which the land in question was sold to Lamar. On the other junior judgment, obtained at the same term, an execution was issued, and the same tract was sold, after the above sale, to David Shriver, Jr., *the lessor of the plaintiff. He also purchased, [*55] subsequently, the same tract, under the prior judgment.

The first question for consideration arises out of the devise, in the will, to Elias Magruder. Did he take a life-estate only, or a fee-simple? That he took an estate in fee-simple conditional in the 100 acres, is urged by the defendant's counsel. And a statute of Maryland of 1786, entitled "an act to direct descents," 2 Kilty's Laws, c. 45, which provides that lands held "in fee-simple, or fee-simple conditional, or in fee-tail to the heirs of the body generally," shall descend in the same manner, is relied on as giving a fee-simple to the devisee. Under this statute, it must be admitted, whether the estate vested be technically considered a fee-tail general, or a conditional fee-simple, in effect, it is a fee-simple.

In 1 Inst. § 20, it is said that "all limitations confined to the heirs of the body, either by direct or circuitous expression, and which are not estates-tail under the statute *de donis*, remain conditional or qualified fees at the common law. A gift of land to a man, and his heirs generally, if he shall have heirs of his body, without any other expression to qualify the word heirs of his body, is a conditional fee. Fleta, b. 3, c. 9, 136. And in Plow. 233, it is said, "and the Lord Dyer in his argument took exception to the replication, for that it confesses the estate-tail in King Henry VII., and then says, that he having issue, Prince Arthur, entered and was seised in fee; whereas, he said, the having issue did not make him to have the fee, for the fee either accrued to him by the remainder, or never." The same doctrine is found in page 250; Machell v. Clarke, 2 Lord Raym. 778. By the statute *de donis*, Westm. 2, 13 Ed. I., a fee-simple conditional estate at common law, in certain cases, was converted into a fee-tail which, by alienation, the ancestor could not change.

The estate under consideration, it is insisted, is a conditional fee-simple; or in other words that the fee vested is liable to be defeated

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on the failure of heirs as provided in the will. On the other side it is argued, that the condition was a precedent one, which must happen before the fee vested. The doctrine above cited seems to favor the first of these positions, as does also the rule in Shelly's case. By that rule, "in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate." This rule had its origin in feudal times, and was, perhaps, in no small degree in-

fluenced by considerations which have long since ceased to [* 56] exist. * The rule, Mr. Preston says, 1 Pres. on Estates, 271,

"is of positive institution, and has this circumstance of peculiarity and variance from rules of construction." "Instead of seeking the intention of the parties and aiming at its accomplishment, it interferes in some, at least, if not in all cases, with the presumable, and in many instances, the express intention." "In its very object, the rule was levelled against the views of the parties."

That this effect has been given to the rule by some adjudications is admitted. But there is a rule of construction applicable to all instruments, and especially to wills, that is, the intention of the parties, which should control any arbitrary rule, however ancient may be its origin. And of this opinion was Lord Mansfield, in *Perrin v. Blake*, 4 Burr. 2579. He says, "the rule is not a general proposition, subject to no control, where the intention is on the other side, and where objections may be answered." And he agreed, as Mr. Preston remarks, with Justices Wilmot and Aston, that "the intention is to govern, and that Shelly's case does not constitute a decisive uncontrollable rule." Mr. Justice Buller, in the case of *Hodgson and wife v. Ambrose*, Doug. 337, was of the same opinion, and also Lord Hardwicke, in *Bagshaw and Spencer*, 2 Atk. 583. Where technical words are used in a deed of conveyance, the legal import of such words must govern. But there is no rule better established, than that in giving a construction to a will, the intention of the testator must prevail. His expressed intention constitutes the law, unless it shall conflict with some established legal principle. Under this rule, the nature and extent of the estate devised to Elias Magruder must depend upon the words of the will.

In the first clause of the devise a life-estate is clearly given to him. "I give and bequeathe to my brother, Elias Magruder, during his natural life, 100 acres of land," &c. The second clause of the devise is equally explicit. "In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeathe the 100 acres of land aforesaid, to him, his heirs and assigns, forever." Now the condition of having heirs as above expressed, is

clearly a precedent condition, and must happen before the estate vests. And if any doubt could arise from the above sentences, whether the testator intended to vest in Elias more than a life-estate, that doubt must be dispelled by the succeeding sentence, "but, should he, the said Elias Magruder, die without an heir so begotten, I give, bequeathe, devise, and desire that the 100 acres of land, aforesaid, be sold to the highest bidder, and the [* 57] money arising from the sale thereof to be equally divided among my six children."

It would be difficult to convey, in more explicit language than is done in the above sentences, the intention of the testator. He gives a life-estate; and then, on the happening of the contingency named, he gives an estate to the devisee and his heirs in fee-simple; but, should the contingency not happen, he directs the land to be sold, and the proceeds distributed among his children. No other conclusion can be arrived at, on this view of the will, than that Elias Magruder took only a life-estate in the land. His conveyance, therefore, could transfer no interest in the land, beyond his own life.

The next question regards the title under the proceedings before the chancellor.

These proceedings were by virtue of "an act of 1785, for enlarging the power of the high court of chancery." 1 Maxcy's Laws, c. 72, § 4, which provides, "that if any person hath died or shall die, leaving real or personal estate to be sold for the payment of debts, or other purposes, and shall not, by will or other instrument in writing, appoint a person or persons to sell or convey the same property, or if the person or persons appointed for the purpose aforesaid, shall neglect or refuse to execute such trust, or if such person or persons, or any of them, shall die before the execution of such trust, so that the sale cannot be made for the purposes intended, in every such case the chancellor shall have full power and authority, upon application or petition from any person or persons interested in the sale of such property, to appoint such trustee or trustees for the purpose of selling and conveying such property, and applying the money arising from the sale to the purposes intended, as the chancellor shall in his discretion think proper."

An objection is made to these proceedings, *in limine*, on the ground that only a part of the heirs interested, united in the application to the chancellor. But this objection is not sustainable. The petition was for the benefit of all the heirs, and the statute does not require that all shall unite in the petition. "Any person or persons interested" may apply to the chancellor. Whether applicants or not, all the heirs equally participated in the results of

the proceedings, and this is a sufficient answer to any technical objection.

But the main point under this head is, whether the sale of the 100 acres now in controversy was of any validity.

That the proceedings before the chancellor constituted a [* 58] suit is * admitted; and also that they are conformably, at least in part, to the mode of procedure in such cases. The chancellor had jurisdiction of the cause, as presented by the petition; and this being the case, no advantage can be taken of errors, however gross, when the record is used collaterally. If a want of jurisdiction appear on the face of the record, the judgment or decree will be treated as a nullity. But where there was jurisdiction, the record must be received as conclusive of the rights adjudicated. No fact established by the judgment of the court can be controverted. In the language of this court, in the case of *Voorhees v. The Bank of the United States*, 10 Pet. 449, the record imports absolute verity. But when a judgment or decree is given in evidence, its nature and effect can only be ascertained by an examination of the record. Let this test be applied to the proceedings of the chancery court under consideration.

It is admitted, and the fact appears from the record, that at the time these proceedings were instituted, Elias Magruder was living and continued to live for seven years afterwards. And as he had a life-estate in the premises in controversy, and the contingency on which the estate was to vest in his heirs, being possible, during his life, the land was not subject to sale under the will. It could only be sold on the devisee's failure to have heirs, which could not occur before his decease.

The petition asks an order to sell the remaining part of the tract called George's Adventure, a part of it having been devised, containing about 356 acres. The sale of the 100 acres, now in contest, was not asked, and indeed could not be, as the tract at that time was not liable to be sold. The decree ordered, "that the real estate in the said will directed to be sold should be sold." Now this decree could only apply to the 356 acres named in the petition, for the reason that the sale of that tract only was prayed for, and it was the only tract, at that time, which the will authorized to be sold. In the language of the decree, it was the real estate directed by the will to be sold.

To construe the decree as embracing the 100 acres tract, would go beyond the prayer of the petition and the jurisdiction of the court. One of the trustees named in the will was deceased, and the other, being insolvent, had been removed by the orphan's court. The sub-

stitution of a new trustee gave to him no power beyond the special order of the court. Under the statute it seems not to have been the practice of the court to appoint a trustee generally, to carry into effect the will; but to point out, by a specific decree, what he shall do, and the mode of doing it. His duties being limited by the decree, he is made the instrument of the court, having no discretion or power under the will. Consequently, in his decree, the chancellor required the trustee to give security, and directed him what notice should be given, and in what manner the sale should be made. This mode of executing the act was clearly within the discretion of the chancellor, specially given to him in the close of the above section. The rule was made and ratified by the chancellor. A deed was executed by the trustee to the purchaser, and nothing further was done until in June, 1812, when the trustee made a second report, that in pursuance of the above decree, after giving public notice, "he had sold to Walter Slicer, the remaining part of the real estate of Zachariah Magruder, deceased, consisting of the 100 acres devised to Elias Magruder."

Now, it is clear that this sale was not made in pursuance of the decree. Neither in the petition, nor in the decree was the tract of 100 acres named or referred to. This proceeding, then, by the trustee, was without authority. It could derive no sanction from the decree. From the record, it would seem that there had been no continuance of the cause for six years, and no step taken in it. The second report is then made by the trustee as stated. This report was ratified and confirmed, "unless by a given day cause to the contrary should be shown," of which public notice was given. No cause being shown, there was a final ratification of the sale, on the 22d of February, 1813. At the time of this sale, it is admitted that Elias Magruder was deceased, without heirs, in the language of the will, "lawfully begotten of him in wedlock." And here a question arises, whether the above sale can be treated as a nullity.

That the trustee was not authorized to sell, by the decree, has already been shown. It would seem, however, from the form of his report, that he assumed to act only in virtue of the decree.

Does the ratification of the sale bring it within the rule, which applies to a case where the court has jurisdiction, but has committed errors in its proceedings? Had the court jurisdiction of the tract of land in controversy? At the time the decree was entered, that tract was no more subject to the power of the court than every other tract in the county. The devisee was in possession, having a life-estate in it subject to become a fee-simple on his having heirs lawfully begotten by him. He had no notice of the proceed- { * 60 }

 McCollum v. Eager. 2 H.

ing, and was in no sense a party to it. The petition did not pray for the sale of this land. In fact, that proceeding can, in no point of view, be considered as authorizing the sale by the trustee. The validity of the sale, then, must rest upon the fact of its having been made by the trustee, and sanctioned by the chancellor. There would seem to be no ground for doubt on this point.

The chancellor is authorized to proceed in a summary mode, under the statute, for the sale of land, in the predicament of the above tract, after the decease of the devisee, without heirs. But he can only proceed on the application of persons interested. Here was no such application for the sale of this land. The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately, and on a full examination of all the facts, still, it must be regarded as an unauthorized proceeding. There was no case before the court — nothing on which its judgment could rest.

No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate, without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity. And so must a sale of land be treated, which has been made without an order or decree of the court, though it may have ratified the sale. The statute, under which the proceeding was had, requires a decree; at least, such has been its uniform construction.

This view being decisive of the title of the lessor of the plaintiff, it is not necessary to consider the other questions in the case.

The judgment of the circuit court is affirmed.

8 H. 495; 2 Wal. 609.

JOHN MCCOLLUM, Plaintiff in Error, v. JENISON EAGER.

2 H. 61.

The jurisdiction of the circuit court in Louisiana, in cases at law and in equity, is distinct, and if a proceeding, which belongs to the latter jurisdiction, is brought up by a writ of error, the writ must be dismissed.

THE case is stated in the opinion of the court.

Coxe moved to dismiss the writ of error.

[* 63] * M'LEAN, J., delivered the opinion of the court.

This is a writ of error to the circuit court for the eastern district of Louisiana.

Under the mode of proceeding in Louisiana, a petition was filed

by the defendant in error, in the circuit court, against Williams and Rightor, on a promissory note given by them for the payment of \$5,000, with interest, &c. And no answer being made, a judgment was entered, by default, against the defendants. An execution was issued, which was levied on a certain tract of land which, on being offered for sale by the marshal a second time, was purchased by John McCollum, the plaintiff in error, on a credit of twelve months. For the payment of the purchase-money at the time stated, McCollum gave bond and security.

At the expiration of twelve months, under the law of Louisiana, *an execution was issued on the bond, which [* 64] has the effect of a judgment. A levy was made on certain slaves, by the marshal, who returned that, after giving notice of sale, all proceedings were stayed on the execution by injunction.

The injunction was obtained by the plaintiff in error on petition, representing that the title to the land purchased by him at marshal's sale, and for which the above bond was given, had failed; and that he had been evicted from the premises. That certain irregularities had taken place in the sale, &c. An injunction was prayed for, and that the bond might be decreed to be cancelled.

On the 14th of February, 1842, "the court ordered, adjudged, and decreed that the injunction granted in this case, be dissolved with twenty per cent. damages, ten per cent. interest, and \$300 amount of fees of counsel employed to be allowed as special damage, and for costs of this suit."

A motion is made to dismiss the writ of error, on the ground that it does not lie in the case.

The proceeding on the bond may have been authorized under the Louisiana practice, there being no distinction in the courts of that State, between a proceeding at law and in chancery. But the relief sought against the bond is mainly appropriate to a chancery jurisdiction, where such a jurisdiction is established. This being the case, the proceeding at law, though conformable to Louisiana practice in the state courts, was wholly irregular. In the federal courts, the jurisdictions of law and chancery, in Louisiana and in all the other States, are distinctly maintained.

If this be viewed as a chancery proceeding, a writ of error does not lie, for a decree in chancery can only be removed to this court, from the circuit court, by an appeal. But an appeal will only lie from a final decree; and the decree in this case was not final, as the bill was not dismissed. The writ of error is dismissed.

Ex parte Barry. 2 H.

Ex parte BARRY.

2 H. 65.

This court has not original jurisdiction of a petition for a *habeas corpus* by an alien, who is a private person.

THE case is stated in the opinion of the court.

STORY, J., delivered the opinion of the court.

This is a petition filed in this court for a writ of *habeas corpus* to be awarded to bring up the body of the infant daughter of the petitioner, alleged to be now unlawfully debarred from him, and in the custody of Mrs. Mary Mercein, the grandmother of the said child, in the district of New York. The petitioner is a subject of the queen of Great Britain; and the application in effect seeks the exercise of original jurisdiction in the matter upon which it is founded. No application has been made to the circuit court of the United States for the district of New York, for relief in the premises, either by a writ of *habeas corpus* or *de homine replegiando*, or otherwise; and, of course, no case is presented for the exercise of the appellate jurisdiction of this court by any review of the final decision and award of the circuit court upon any such proceedings. Nor is any case presented for the exercise of the appellate jurisdiction of this court upon a writ of error to the decision of the highest court of law and equity in the State of New York, upon the ground of any question arising under the 25th section of the Judiciary Act of 1789, c. 20.¹

The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now, the constitution of the United States has not confided any original jurisdiction to this court, except "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party." The present case falls not within either predicament. It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition; and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution or laws of the United States. Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek

[* 66] redress * in such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to

¹ 1 Stats. at Large, 85.

 Burke v. McKay. 2 H.

redress in those tribunals, the vacancy in the office of the judge of this court, assigned to that circuit and district, creates no legal obstruction to the pursuit thereof.

14 H. 103.

SPALDING v. THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
FREDERICK F. BACKUS.

2 H. 66.

BEARDSLEY moved to dismiss the writ of error in this case, because the appeal bond ran to The People of the State of New York, or Frederick F. Backus, in the alternative.

But Mr. Justice Story delivered the opinion of the court, and said that the bond was good, and, if forfeited, might be sued upon in the name of the people or of the relator, at the option of the government.

GLENDY BURKE, Plaintiff in Error, v. ROBERT MCKAY.

2 H. 66.

It is not necessary, in Mississippi, or by the general law merchant, that a promissory note should be protested by a notary, or that he should give the notices of dishonor. If a justice of the peace be empowered, by statute, to act as notary, he is one *quoad hoc*. An indorser, who has settled with the maker, and discharged him from payment, is not entitled to notice of non-payment.

THE case is stated in the opinion of the court.

Henderson, for the plaintiff.

* STORY, J., delivered the opinion of the court. [* 70]

This is a writ of error to the circuit court of the district of Mississippi. The plaintiff in error brought an action of *assumpsit* in that court, against the defendant in error, as indorsee upon a promissory note, dated at Clinton, Mississippi, January 20, 1837, whereby R. E. Stratton, Samuel W. Dickson, and B. Garland, or either of them, on the 1st day of January, 1840, promised to pay Robert Mathews, or order, \$2,800, for value received. The note was indorsed by Mathews as follows: "I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest, if not paid at maturity." The note was afterward indorsed by McKay, (the defendant,) as it should seem, in blank, and the plaintiff in error, in his declaration, made title as immediate indorsee to McKay.

At the trial of the cause, upon the general issue, the plaintiff read the note and the indorsement, and also proved that, at the maturity of the note, due demand of payment was made of the makers, by S. W. Humphreys, a justice of the peace of Hinds county, Mississippi, styling himself "acting notary public;" who, upon [*71] the non-payment, *made due protest thereof, (the protest being by consent admitted as evidence of the facts,) and gave due notice thereof to the payee of the note and to all the indorsers. The defendant (McKay) also admitted that, in a settlement with the makers of the note, in some other transactions, the present note was included, and the defendant released the makers from all liability thereon, but he denied that he had ever received of the makers full payment of the said note; and that, upon a compromise of all claims and controversies between them, he released the makers from all liability to the defendant; and he agreed that the same statement should be read and received at the trial of the case by the court and the jury. The district judge (who alone sat in the cause) instructed the jury that, in order to charge the indorser of a promissory note, the plaintiff must prove that it was protested on the day of its maturity by a notary public, and demand made, and notice of non-payment given by him; that the statement of Humphreys, admitted as evidence, not proving that fact, they must find for the defendant. Whereupon the jury returned a verdict for the defendant, and judgment passed accordingly. A bill of exceptions was taken by the plaintiff, to the instruction of the court at the trial; and the cause now comes before us upon the writ of error to examine the correctness of that instruction.

And we are all of opinion that the instruction was incorrect, and not maintainable in point of law. In the first place, by the general law merchant, no protest is required to be made upon the dishonor of any promissory note, but it is exclusively confined to foreign bills of exchange. This is so well known that nothing more need be said upon the subject than to cite the case of *Young v. Bryan*, 6 Wheat. 146, where the very point was decided. It is true that it is a very common practice for a notary public to be employed to make demand of payment of promissory notes from the makers, and also to give notice of the dishonor to the indorsers thereon. But this is a mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognized by law as binding upon the holder. Unless, therefore, there be some statute in Mississippi requiring the intervention of a notary in such cases, (as we understand there is not,) or some general usage equally binding, it is clear that the instruction proceeded upon a mistaken

ground. In the next place, it is no necessary part of the official duty of a notary (subject to the like exceptions) *to give [*72] notice to the indorsers of the dishonor of a promissory note, although certainly it is a very convenient and useful course in the transaction of such affairs in commercial cities. In the next place, if a protest were necessary, it is equally clear that it is not indispensable in all cases that the same should be actually made by a person who is in fact a notary. In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary, there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary. See Howard and Hutchinson's Statutes of Mississippi, c. 37, § 24, p. 430.

In the next place, in the present case, under the circumstances, the indorser (McKay) was not entitled to any notice whatsoever of the dishonor. He had actually discharged the makers from all liability for the payment of the note by his release and settlement with them. Of course, the notice could be of no use or value to him; for he would in no event be entitled to any recourse over against them; and, therefore, no notice to him would have been necessary, although it fully appears that he had received due notice of the dishonor.

For these reasons, we are of opinion that the judgment ought to be reversed and *venire facias de novo* awarded.

4 H. 262.

BENJAMIN J. KNAPP, Plaintiff in Error, v. EDMUND BANKS.

2 H. 73.

The amount necessary to the jurisdiction of this court, is the sum in controversy at the time of the judgment, and interest afterwards cannot be considered.

If the plaintiff claims on the record more than \$2,000, and recovers less than that sum, he may have a writ of error.

The judgment must be for more than \$2,000 to enable the defendant to have a writ of error.

THE case is stated in the order of the court, which is subjoined to the opinion.

* STORY, J. delivered the opinion of the court. [*73]

We entertain no doubt whatsoever upon this question.

The amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent addi-

 Stockton v. Bishop. 2 H.

tions thereto, such as interest. The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding \$2,000, and the *ad damnum* exceeds \$2,000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than \$2,000, there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than \$2,000, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given; and consequently, he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not.

Order. Mr. Ogden, of counsel for the defendant in error, moved the court to dismiss this writ of error for the want of jurisdiction, because the matters or sum in controversy, exclusive of costs, did not exceed \$2,000; which was opposed by Mr. Benedict, of counsel for the plaintiff in error, who contended that although the judgment of the circuit court was only for \$1,720, yet that the interest on that sum added thereto would make it exceed \$2,000. To which Mr. Ogden rejoined, that the right of the party to a writ of error was controlled by the amount at the rendition of the judgment, and could not be enlarged by time. On consideration whereof, it is the opinion of this court, that where the plaintiff in the court below claims \$2,000 or more, and the ruling of the court is for a less sum, that he is entitled to a writ of error; but that the defendant in the court below is not entitled to such writ where the judgment against him is for a less sum than \$2,000 at the time of the rendition thereof;—that this is the settled practice of this court. Whereupon it is now here ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

4 Wal. 168.

LUCIUS W. STOCKTON and DANIEL MOORE, Plaintiffs in Error, v.
HARRIET BISHOP. Defendant.

2 H. 74.

If an execution has been issued by the circuit court, in a case brought here by writ of error, where the plaintiff in error was entitled to a *supersedeas*, this court will issue a writ of *supersedeas*.

THE facts upon which the writ of *supersedeas* issued are recited in the writ which is subjoined to the opinion.

Stockton v. Bishop. 2 H.

* STORY, J., delivered the opinion of the court. [*75]

Upon the facts stated in the application, there is no doubt that the writ of error, bond, and citation, having been given in due season according to law, operated as a stay of execution, and that a *supersedeas* to the *fieri facias* ought to issue from this court to supersede and quash the same, as prayed for in the motion. Indeed, the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below. But it is equally competent for this court to do the same thing in furtherance of the purposes of justice. The motion is, therefore, granted, and a *supersedeas* will be issued accordingly.

ORDER.

UNITED STATES OF AMERICA, SS.:

The President of the United States of America.

To the Honorable the judges of the circuit court of the United States for the western district of Pennsylvania, and to the marshal of the United States for said district, greeting:

Whereas, lately in the said circuit court, ——— before you or some of you, in a cause between Harriet Bishop, plaintiff, and Lucius W. Stockton and Daniel Moore, defendants, judgment was rendered by the said circuit court on the 7th December, 1843, in favor of the said plaintiff and against the said defendants, for the sum of \$6,500 and costs of suit, and on the 15th December, 1843, the aforesaid defendants, with sufficient security, filed their bond in error, which was approved by the judge of the district court, so as to operate as a *supersedeas*, the defendants having sued out a writ of error in due form and time, and a citation having been regularly taken out, served upon the defendant in error, and duly returned, as by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court of the United States by virtue of a writ of error, agreeably to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and forty-four, it is made to appear on affidavit to the said supreme court of the United States, that, notwithstanding the premises, the aforesaid plaintiff in the said circuit court caused a writ of *fieri facias* to be issued on the 11th day of January, 1844, upon the judgment obtained in said cause, and to be placed *in the [*76] hands of the aforesaid marshal for service and satisfaction thereof. On consideration whereof, it is now here ordered by this court that a writ of *supersedeas* be, and the same is hereby awarded

Porterfield v. Clark. 2 H.

to be directed to the aforesaid marshal, commanding and enjoining him and his deputies to stay every and all proceedings upon the said writ of *feri facias*, and that he return the said execution with the writ of *supersedeas* to the said circuit court, and that the judges of the said circuit court do cause the said writ of execution to be quashed, the same having been unjustly, improvidently, and erroneously issued out of the said court at the instance of the said plaintiff. You, therefore, the marshal of the United States for the western district of Pennsylvania, are hereby commanded that, from every and all proceedings on the said *feri facias*, or in anywise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you do forthwith return the said *feri facias*, together with this *supersedeas*, to the said circuit court, as you will answer the contrary at your peril. And you the judges of the said circuit court are hereby commanded that such further proceedings be had in the premises, in conformity to the order of this court, and as according to right and justice and the laws of the United States ought to be had, the said execution notwithstanding.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, the 13th day of March, in the year of our Lord one thousand eight hundred and forty-four.

WM. THOS. CARROLL,

Clerk of the Supreme Court of the United States.

11 H. 294.

WILLIAM KINNEY and JAMES J. MECHIE, Executors and Trustees of ROBERT PORTERFIELD, deceased, v. MERIWETHER L. CLARK, WILLIAM P. CLARK, GEORGE R. H. CLARK, and JEFFERSON R. CLARK, a Minor by the aforesaid GEORGE R. H. CLARK, his Guardian, Heirs, and Devisees of WILLIAM CLARK, deceased, and ROBERT O., ANN C., GEORGE W., and FRANCES JANE WOOLFOLK, Heirs of GEORGE WOOLFOLK, deceased, and others.

2 H. 76.

A law of Virginia, passed in 1779, for opening a land-office, &c., contained a clause that no entry, or location of land, should be admitted within the country and limits of the Cherokee Indians. *Held*, that the tract west of the Tennessee River was not then within the limits of the country belonging to those Indians.

The title to lands in Virginia, Kentucky, and Tennessee, could be tried under a *caveat*, and the judgment bound those who had a claim to an equitable title under one of the parties. The courts of Kentucky having decided that an entry under a military warrant was necessary to give title, those claiming under such warrants, without entry, are barred by the act of limitations of Kentucky of seven years; for though that act does not bar those who claim by legislative grant, persons claiming under military warrants only obtained inchoate, and not complete titles from the legislature, and so are not within the exception.

Though the Kentucky act of 1809 could not have complete operation west of the Tennessee when it was passed, yet it did have such operation as soon as the restrictions imposed by treaty were removed.

APPEAL from the circuit court of the United States for the district of Kentucky, in a suit in equity, by Robert Porterfield, the testator of the plaintiffs in error, against the defendants. The bill set forth the title of Porterfield, as founded on three patents issued in 1824, 1825, and 1826, respectively, upon entries under the authority of two military warrants, the first issued in 1782, and the second issued in 1783, under the acts of Virginia of November, 1781, and May, 1782. A more particular statement of the complainants title is deemed unnecessary, because it was not denied that the defendants had the elder title, and the better, if valid; and the opinion of the court examines only the defendants title, and the decree was rested on its validity. The title of the defendants rested upon a patent and survey founded upon entries made by Colonel George Rogers Clark, (under whom the defendants claimed,) on the 18th of May, 1780, by virtue of treasury warrants of Virginia. These entries were made under an act of Virginia, passed in May, 1779, which contained, among others, the following restriction:—

“No entry or location of land shall be admitted within [*78] the country and limits of the Cherokee Indians, or on the northwest side of the Ohio River, or on the lands reserved by act of assembly for any particular nation or tribe of Indians, or on the lands granted by law to Richard Henderson and Company, or in that tract of country reserved by resolution of the general assembly for the benefit of the troops serving in the present war, and bounded by the Green River and southeast course from the head thereof to the Cumberland Mountains, with the said mountains to the Carolina line, with the Carolina line to the Cherokee or Tennessee River, with the said river to the Ohio River, and with the Ohio to the said Green River, until the further order of the general assembly.”

The bill avers Clark's title to be invalid because made on lands reserved, by resolution of the general assembly of Virginia, for officers and soldiers of that State then in the service of the United States; also because made on lands reserved by law for the Chickasaw Indians, and also on lands reserved by the act aforesaid as being “within the country and limits of the Cherokee Indians.” Other objections to Clark's title were, that the entry on which it was founded was not sufficiently precise and clear, and that the surveyor was not duly authorized.

The answers, besides contesting the right of the complainants to relief on the ground of title, set up an exclusive possession of the

land, for more than seven years, before the filing of the bill, by the tenants of the respondents, and rely on the statute of limitations of Kentucky.

Morehead, and Chapman Johnson, for the appellants.

Crittenden, contra.

[* 106] * CATRON, J., delivered the opinion of the court.

For the principal facts, we refer to the statement of the reporter.

The first question in order presented by the bill depends on the validity of the complainant's title. But as that of the defendants is the elder, and Clark's entries not objected to on the ground that they are void for want of specialty; and the survey and patent founded on them being in conformity to the locations, we will at [* 107] once proceed * to the main question presented by the bill; that is, whether Clark's entries were made in the Cherokee country or limits, and therefore void for this reason as against Porterfield's subsequent entries. The first being on treasury warrants, and the last on military warrants. The act of 1779, by virtue of which Clark's entries were made, excepted the Cherokee lands from location; and if the land in dispute, (in October, 1780,) was such, then Clark's entries are void, if not they are valid; and this fact being found either way, will end the controversy. We are called on to find the fact; and as it has been agitated in regard to this title, for nearly sixty years, uncommon care has been bestowed on the question, and a second argument been ordered.

The defendant's title came before this court in *Clark v. Smith*, 13 Pet. 200, when the entries of Clark were pronounced special; and the survey and patent declared to conform to the entries. And in which case it was also held, that it was immaterial whether the entry was made on the lands claimed by the Chickasaws or not; it could only be obnoxious to the provisions of the statute of 1779, if made on lands reserved from location by that act; and the lands of the Chickasaws were not thus reserved. So it had been decided by the court of appeals of Virginia in *Marshall and others v. George R. Clark* in 1791, Hughes, 40, and which was affirmed in *Rollins v. Clark*, by the court of appeals of Kentucky, in 1839, 8 Dana; 26.

The reservation is: "No entry or location of land, shall be admitted within the country and limits of the Cherokee Indians." The bill alleges the entry of Clark to be within the excepted lands.

The first inquiry we will make is, how far the contest stands

affected by former decisions, made by the court of appeals of Virginia, by this court, and by the court of appeals of Kentucky.

As to patents made by Kentucky, on warrants issued by that State after the Chickasaw title was extinguished, for lands west of Tennessee River, the case of *Clark v. Smith* as an adjudication is direct to the point, that Clark's patent is superior to such titles. This may be true, and yet Clark's entry be void; as Kentucky, in 1794, "not only authorized, but made it the imperative duty of the register to issue a patent on the certificate of survey; as he seems to have done in obedience to the act. We cannot admit that a patent thus issued pursuant to the authority and mandate of the law, can be deemed void, merely because the entry of the patentee was invalid." We * use the language of the court of appeals [* 108] of Kentucky, in the case of *Rollins v. Clark*, 8 Dana, 28.

If Clark's entry was made, however, on lands reserved from location by the act of 1779, then it is void, because the act did not open the land-office for such purpose, nor extend to the excepted lands; and whether the exception reserving the Cherokee country, included the lands west of Tennessee River, was in 1779, and is now a matter of fact, as already stated, for the court to ascertain. This fact is not concluded by the case of *Clark v. Smith*, 13 Pet. 195, although materially influenced by it. That adjudication, so far as this question was involved in it, is founded mainly on the case of *Thomas Marshall, George Muter, and others, superintendents of the Virginia State Line, v. George Rogers Clark, Hughes*, 39, in a suit by *caveat*, to restrain Clark from obtaining a patent on the survey founded on his entries; two entries having been included in it. The cause was tried before the court of appeals of Virginia in 1791, on the *caveat*, filed in 1786. The first fact agreed by the parties, and submitted to the court, was whether the locations of Clark could be made west of the Tennessee River on treasury warrants; or in other words, whether that country was reserved from location, as being the country and limits of the Cherokee Indians. The court held, "the solution of the question to depend on a matter of fact to be decided on evidence; and none such appearing, or being supplied by any law, charter, or treaty, produced or suggested, which ascertained what the country or limits of the Cherokees was in 1779, no solution of the question could be given, except that it was the opinion of the court, that the party whose interest it was to extend the exception to the land in dispute, must prove the land to be within the description of that exception." All the other questions were also decided against the caveators, and the *caveat* ordered to be dismissed. The judgment in effect ordered that a patent should issue to Clark on his survey; and in fact, adjudged

the better right to be in him. A suit by *caveat* was the ordinary mode of trying titles in Virginia, before a patent issued, and was equally conclusive on the parties, as if it had been by bill in equity; this is the settled doctrine of Kentucky, and also Tennessee; and must be so from the nature of the suit. The power and jurisdiction of the courts to try titles in this manner, are conferred by statute, which are very similar in the States named; the practice as to the mode of proceeding, and the effect of the judgment being the same in each. For evidence of this, we refer to the many cases [* 109] * reported by Hughes; and to the cases of *Peck v. Eddington*, 2 Tennessee, 331; *Bugg v. Norris*, 4 Yerg. 326, and *Peeler and Campbell v. Norris*, 4 Yerg. 331. "The powers of the courts, (it is said in *Bugg v. Norris*,) will be found coextensive with any conflicting rights two claimants may have, where the defendant is attempting to perfect his entry into a grant by survey." Each party had the privilege in the case of the superintendents against Clarke to submit such facts as were material to sustain his right; if not agreed an issue could be asked, and a jury empanelled, to find on the contested facts. They were all agreed. On these, the court pronounced on the law of the case, and determined who had the better claim to the land, and awarded to him the patent.

The plaintiff or defendant may introduce more or less evidence to sustain his claim; but if he fail, he cannot be heard to say, in a second suit, his principal evidence of title was not introduced in the first, and therefore he will try the same issue again in another form of proceeding on different and better evidence. 4 Yerg. 337-8; *Outram v. Morewood*, 3 East, 357.

The patent being awarded to Clark, it was adjudged that he should take the land in fee; and the whole legal estate and seisin of the commonwealth in the lands. Had the judgment been, that no patent issue to George Rogers Clarke, then he would have been estopped to controvert the superior right of the superintendents. If he would have been estopped, so were the superintendents, on the judgment being the other way. 4 Yerg. 333. Estoppels are mutual. 4 Com. D. Estoppel, B. They run with the land, into whose hands soever the land comes; by which the parties and all claiming under them, as well as the courts, are bound; were it otherwise, litigation would be endless. Such is the established rule. *Trevinan v. Lawrence*, 1 Salk. 276, reported also by Lord Raymond.

The superintendents were therefore estopped by the judgment of the court of appeals of Virginia from averring that Clark's entry lay within the Cherokee country, and how was Porterfield affected by that judgment?

By the act of November, 1787, opening the military lands to location, those west of Tennessee River inclusive, the officers were authorized to appoint so many of their number superintendents as they might deem proper to locate (after selections by survey had been made) all the claims of the officers and soldiers. For this purpose they were given authority to select the lands and distribute them among *the claimants according to their [* 110] respective ranks. The act of December, 1782, makes more distinct and further provision, and gives increased power to the superintendents. The entire country reserved to the uses of the military claimants was surrendered to the possession of the superintendents, as trustees, from which they might select any lands, to comply with the purposes of the trust; as such trustees in possession, they had the right to file the *caveat* against Clark, after they had selected the land, or any part of it, (located by him,) for the use of the officers and soldiers. When selected and surveyed, then the surveys were to be drawn for and allotted as chance might determine; after which, the party thus entitled was authorized to enter of record by an ordinary location, the number he drew in the lottery. Porterfield drew the lands set forth in the bill; to protect his entries the *caveat* was filed, as well as to protect others set forth in the record adjoining Porterfield's; and also to maintain the general right of all the claimants entitled exclusively to locate in the reserved lands.

As Clark would have been estopped to deny the right of the superintendents, (had they been successful,) to appropriate the land in dispute, it is difficult to say that Porterfield, for whose benefit especially the *caveat* suit was prosecuted by those acting for his use, is not also estopped, on the principle of mutuality. It is hardly possible to separate the right of those acting as trustees, from that of the *cestui que trust*; still, as the proceedings and judgment in the suit by *caveat* are not set up as a defence in any manner, we can only look to them as furnishing cogent reasons that it could not be proved during the time the *caveat* was pending that the lands west of the Tennessee River were part of the Cherokee country, in 1779.

In the case of *Clark v. Smith*, 13 Pet. 195, no evidence was produced to the court, other than that furnished by the treaties with the Cherokees and Chickasaws; together with the history of the country, and which were existing and open to the court of appeals of Virginia in 1791; except the treaties made since that time, and these we thought had no material influence on the question; and therefore on the evidence then before us, it was declared, that Clark's title was not open to controversy on the ground (then as now) assumed, that the land when located lay within the country of the Cherokee Indians.

Does the record before us and the other matters adduced, furnish additional evidence to change the result of that conclusion? As it does not appear in the cases referred to, what the existing [*111] treaties, *contracts, and intercourse with the Cherokees had been in 1791, a reference will be made to them, so far as they may affect this controversy. During the British colonial government of Virginia, by different treaties, previous to 1777, the eastern limits of the Cherokees commenced six miles above the Long Island in Holston River, (now in the county of Sullivan, Tennessee,) from thence to Cumberland Gap; then to the head of the Kentucky River, and down the same to the Ohio. This line ran down the Cumberland Mountain from Holston River to the gap, and included in part the great road from Virginia to Kentucky, passing through Cumberland Gap. The citizens of Virginia settled on the road, and west of the line; irritation on part of the Cherokees was the consequence. In July, 1777, the Long Island treaty was made, at Fort Henry, standing at the island. By that treaty, the Indian line was removed further west; commencing six miles above the island, and running with the river to the mouth of Cloud's Creek; being the second creek below Rogersville, in Hawking county, Tennessee, and a few miles below that place; thence to a high point of Cumberland Mountain a few miles below the gap, here the line stops, and it was the only one between Virginia and the Cherokees existing in 1779, (when the land law was passed,) except the boundaries established by the grant to Richard Henderson and Company, dated in March, 1776; the extent and effect of which, will be presently seen. As the treaty of 1777, has a most important bearing on the facts hereafter stated, its material parts are given.

“Article 3. That no white man shall be suffered to reside in or pass through the Overhill farms without a proper certificate, signed by three magistrates in the county of Washington, in Virginia, or in the county of Wataugo, in North Carolina, to be produced to, and approved by the agents at Chota. Any person failing or neglecting to comply herewith, is to be apprehended by the Cherokees and delivered to the said agent, who they are to assist in conducting to the commanding officer at Fort Henry; and the said Cherokees may apply to their own use all the effects such persons may be in possession of at the time they are taken in the nation. And should any runaway negroes get into the Overhill farms, the Cherokees are to secure them until the agent can give notice to the owner, who, on receiving them, are to pay such a reward as the agent may judge reasonable.

“Article 4. That all white men residing in or passing through the

Overhill country, properly authorized or certified as aforesaid, * are to be protected in their persons and property, and [* 112] to be at liberty to remove in safety when they desire it. If any white man shall murder an Indian, he shall be delivered up to a magistrate in Washington county, to be tried and put to death according to the laws of the State. And if any Indian shall murder a white man, the said Indian shall be put to death by the Cherokees, in the presence of the agent at Chota, or two magistrates in the county of Washington.

“Article 5. That as many white people have settled on lands below the boundary between Virginia and the Cherokees, commonly called Donelson’s line, which lands they have respectively claimed in the course of this treaty, and which makes it necessary to fix and extend a new boundary, and to make a just and equitable purchase of the lands contained therein, it is therefore agreed by and between the said commissioners in behalf of the commonwealth of Virginia, of the one part, and the subscribing chiefs in behalf of the said Cherokees, on the other part, in free and open treaty without restraint, fear, reserve, or compulsion of either party, that a boundary line between the people of Virginia and the Cherokees be established, and the lands within the same be sold and made over to the said commonwealth; which line is to begin at the lower corner of Donelson’s line on the north side of the River Holston, and to run thence down that river according to the meanders thereof, and binding thereon including the great island to the mouth of Claud’s Creek, being the second creek below the Warrior’s Ford at the mouth of Carter’s Valley; thence running a straight line to a high point on Cumberland Mountain, between three and five miles below or westward of the great gap which leads to the settlement of the Kentucky.

“This last-mentioned line is to be considered as the boundary between Virginia and the Cherokees. And all the lands between the said line and that run by Col. Donelson, and between the said river and Cumberland Mountain, as low as the new boundary, is to be the present purchase.

“For which tract of land, or so much thereof as may be within the limits of Virginia when the boundary between the States of Virginia and North Carolina is extended, the said commissioners agree, in behalf of the commonwealth, to give to the said Cherokees two hundred cows and one hundred sheep, to be delivered at the great island when the said line shall be run from the river to Cumberland Mountain, to which the said Cherokees promised to send deputies * and twenty young men, on due notice of the [* 113] time being given them.

“And for and in consideration of the said stocks of cattle and sheep, the said chiefs do, for themselves and their nation, sell, make over, and convey to the said commonwealth, all the lands contained within the above-described boundary, and do hereby forever quit and relinquish all right, title, claim, or interest in and to the said lands or any part thereof; and they agree, that the same may be held, enjoyed, and occupied by the purchasers, and, that they have a just right, and are fully able to sell and convey the said lands in as full, clear, and ample a manner as any lands can possibly be, or ever have been sold, made over or conveyed by any Indians whatever.

“Article 6. And to prevent as far as possible any cause or pretence, on either side, to break and infringe on the peace so happily established between Virginia and the Cherokees, it is agreed by the commissioners aforesaid and Indian chiefs, that no white man on any pretence whatsoever shall build, plant, improve, settle, hunt, or drive any stock below the said boundary, on pain of being drove off by the Indians, and his property of every kind being taken from him. But all persons who are or may hereafter settle above the said line, are quietly and peaceably to reside thereon without being molested, disturbed, or hindered, by any Cherokee Indian or Indians; and should the stocks of those who settle near above the line, range over the same into the Indian land, they are not to be claimed by any Indians, nor the owner, or any persons for him, be prevented from hunting them, provided such person do not carry a gun; otherwise the gun and stock are both forfeited to the Indians, or any other person who on due proof can make it appear. Nor is any Indian to hunt or to carry a gun within the said purchase, without license first obtained from two justices; nor to travel from any of the towns over the hills, to any part within the said boundary, without a pass from the agent. This article shall be in full force until a proper law is made to prevent encroachment on the Indian lands, and no longer.”

This treaty fully explains why the Cherokee country was excepted from the land law of 1779, and locations on it prohibited; no reasons could add force to its stipulations.

In November, 1785, the next treaty was made at Hopewell,¹ with the Cherokees by the United States, and a new boundary [*114] was *established, beginning at the mouth of Duck River on the Tennessee; thence northeast, to the ridge dividing the waters running into Cumberland River, and the Tennessee: thence eastwardly along said ridge to a point from which a northeast

¹ 7 Stats. at Large, 18.

line would strike Cumberland River forty miles above Nashville. The first corner from the beginning on the ridge is about one hundred miles from the mouth of Tennessee River.

In January, 1786, the same commissioners who treated with the Cherokees, also made a treaty at Hopewell¹ with the Chickasaws; beginning at the Cherokee corner on the ridge, dividing the waters of the Cumberland and Tennessee rivers, and running westerly with said ridge to the Ohio River, and then down the same.

All lands west of this line were guaranteed to the Chickasaws. The treaty was not one of cession on part of these Indians; but the establishment of existing boundaries; the one from the Cherokee corner, to the Ohio, being the only line, dividing territory claimed by the United States, to which the Indian title had been extinguished contained in the treaty, our inquiries need extend no further for the purposes of the present controversy. That it was deemed the ancient boundary of the Chickasaws, by themselves, will appear hereafter; as it will also appear that the Cherokees, in no instance, so far as our researches have extended, asserted to the contrary; but that they admitted the fact, on different occasions in a manner free from exception; and which admissions were well calculated to remove any doubt on this point.

That the lands west of the line on the ridge belonged to the Chickasaws, and not to the Cherokees, in 1779, is rendered almost certain by the deed the Cherokees made to Richard Henderson, Thomas Hart, Nathaniel Hart, John Williams, John Luttrell, Wm. Johnston, James Hogg, David Hart, and Leonard Hendley Bullock, on the 17th day of March, 1775. The first part of the deed recites: "That the Cherokee nation, or tribe of Indians, being the aborigines and sole owners by occupancy from the beginning of time of the lands, on the waters of the Ohio River, from the mouth of the Tennessee River, up the said Ohio, to the mouth of the Great Canaway, or New River, and so across by a southward line to the Virginia line, by a direction that shall strike or hit Holston River six English miles above, or eastward of the Long Island therein; and other territories and lands thereunto adjoining;" do grant, by Oconestoto, chief warrior, and first representative of the Cherokee nation, (acting * with other warriors named,) on part of said [* 115] nation to Richard Henderson and the others, part of said lands, for the sum and consideration of £10,000 lawful money of Great Britain, to said Cherokee nation in hand paid; the receipt of which is acknowledged for and on behalf of the nation, by the war-

¹ 7 Stats. at Large, 24.

rriors making the treaty; the lands granted lying on the Ohio River; beginning on the said River Ohio, at the mouth of the Kentucky, Chenoca, or what by the English is called Louisa River; from thence running up the said river and the most northwardly branch of the same to the head spring thereof; thence a southeast course to the top ridge of Powell's Mountain; thence westwardly along the ridge of said mountain unto a point from which a northwest course will hit, or strike, the head spring of the most southwardly branch of the Cumberland River; thence down the said river, including all its waters, to the Ohio River; thence up the said river as it meanders to the beginning.

Various covenants are contained in the deed, and among others, that the grantees, their heirs and assigns, shall and may from time to time, and at all times thereafter peaceably and quietly, have, hold, occupy, possess, and enjoy the premises granted without the trouble, let, hinderance, molestation, or interruption of the Cherokee nation or any one claiming under the Cherokees. And Joseph Martin and John Farrer were appointed by the grantors, to put the grantees in possession.

They did take the possession, and founded "The colony of Transylvania," on their grant; and on the 23d day of May, 1775, the first legislative assembly of said colony was held therein, and regulations adopted for the future government of the same. Col. Richard Henderson, acting for himself and the other proprietors, communicated with the assembly, by an address delivered to it; the proprietors exhibited their deed to the soil of Transylvania from the aborigines; Col. Henderson, in person, and John Farrer, as attorney in fact for the Cherokees, attended the convention, when Farrer, in the name of the head warriors, chiefs, and Cherokee Indians, in presence of the convention, made livery and cession, of all the lands in the deed of feoffment above recited; which deed was there again produced. A copy of it, and of the proceedings, appear in Butler's History of Kentucky, 566. The same deed is set forth in Haywood's History of Tennessee.

This deed and the proceedings under it make up the most prominent historical transaction in the early history of Kentucky; [* 116] and it * has been relied on by both sides without objection.

And as a historical fact, it was quite as prominent in Virginia in 1791, when the *caveat* suit was decided; and also in 1779 when the first land law under consideration was passed. By the act of October, 1778, c. 3, and the resolution of the convention that formed the first constitution of Virginia in 1776, 2 Rev. Code, 350, 353, and the reservation for Henderson and Co. of two hundred

thousand acres at the mouth of Green River, this manifestly appears. The land reserved to Henderson and Co. is declared in full compensation to them and their heirs for the consideration paid to the Cherokees, and for the expense and trouble in acquiring the country and aiding in its settlement.

The act of October, 1778, c. 3, recites: "Whereas it appears to the general assembly that Richard Henderson and Company have been at very great expenses, in making a purchase of the Cherokee Indians; and although the same has been declared void, yet as this commonwealth is likely to receive great advantage therefrom, by increasing its inhabitants, and establishing barriers against the Indians, it is, therefore, just and reasonable the said Richard Henderson and Company be made a compensation for their trouble and expense;" and by the 2d section the land at the mouth of Green River is granted as the compensation proposed.

The act of May, 1779, c. 6, declares that the commonwealth has the exclusive right of preëmption from the Indians of all lands within the limits of its territory, as described in the constitution of government in the year 1776; that no person had a right to purchase any lands from any Indian nation within the commonwealth, except persons duly authorized on public account for the use and benefit of the commonwealth.

That every purchase of lands made by or on behalf of the crown of Great Britain from any Indian nation in the before-mentioned limits, doth and ought to enure forever to and for the use and benefit of this commonwealth, and that all sales and deeds which have been made by any Indian or Indians, or by any Indian nation for lands within said limits, for the separate use of any person or persons, whatsoever shall be, and the same are hereby declared utterly void and of no effect.

The construction of the acts of 1778 and 1779, has been that the deed to Henderson and Company was void, as against the commonwealth; but valid as against the Cherokees, and therefore the title to the lands conveyed passed to the commonwealth. This assumption has * been maintained from the time the conven- [* 117] tion sat in May, 1776, as the resolutions of the convention show. And it received the sanction of the United States at the treaty of Hopewell with the Cherokees in 1785. The Indians disavowed it when the treaty commenced. On the 22d of November, before the Chickasaws had arrived at the treaty ground, the commissioners called on the Cherokees for their boundary; the Indians postponed it. On the 24th, they were again called on, and then said, give them a pencil and paper, and leave them to themselves, and they

would draw a map of their country. November 26, the map, and a description of the boundary claimed was presented to the commissioners by Tassel, who spoke on behalf of the Indians. It began on the Ohio above the mouth of the Kentucky River; ran to the Cumberland River where the Kentucky road crossed it; thence to the Chimney-top Mountain in North Carolina, and southward.

Tassel said, on presenting the map: "I know Richard Henderson says he purchased the lands of Kentucky, and as far south as the Cumberland, but he is a rogue and a liar, and if he was here I would tell him so. He requested us to let him have a little land on Kentucky River for his cattle and horses to feed on, and we consented, but told him at the same time he would be much exposed to the depredations of the northern Indians, which he appeared not to regard, provided we gave him our consent. If Attacullaculla signed his deed, we are not informed of it; but we know Oconestoto did not, and yet his name is to it; Henderson put it there, and he is a rogue."

To which the commissioners replied: "You know Colonel Henderson, Attacullaculla, and Oconestoto are all dead; what you say may be true; but here is one of Henderson's deeds, which points out the line, as you have done, nearly till it strikes Cumberland, thence it runs down the waters of the same to the Ohio, thence up said river as it meanders to the beginning. Your memory may fail you; this is on record, and will remain forever. The parties being dead, and so much time elapsed since the date of the deed, and the country being settled, on the faith of the deed, puts it out of our power to do any thing respecting it; you must therefore be content with it, as if you had actually sold it, and proceed to point out your claim exclusive of this land."

Tassel answered: "I know they are dead, and I am sorry for it, and suppose it is now too late to recover it. If Henderson [* 118] were living, I should have the pleasure of telling him he was a liar; but you told us to give you our bounds, and therefore we marked the line; but we will begin at Cumberland, and say nothing more about Kentucky, although it is justly ours."

On the 2d of December, 1785, the commissioners reported to the secretary at war amongst other things: "That in establishing the boundary, (with the Cherokees,) which is the chief cause of complaint with the Indians, we were desirous of accommodating the southern States and their western citizens, in any thing consistent with the duty we owed to the United States.

"We established the line from 40 miles above Nashville on the Cumberland, agreeable to the deed of sale to Richard Henderson and Co. as far as the Kentucky Ford; thence to the mountain six

miles south of Nollchuckey, agreeable to the treaty in 1777, &c., with Virginia and North Carolina." The latter treaty is that of Long Island, above set out.

The sale to Henderson and Company, therefore, stands on the same grounds as if it had been made by the authority of the crown of Great Britain, so far as boundary and Indian rights stand affected.

Its southern line from the top of Powell's Mountain ran westwardly on the top of the mountain, to a point from which a northwest course would strike the head spring of the most southwardly branch of Cumberland River, thence down said river, including all its waters to the Ohio River; thence up that river. The most southwardly branch of the Cumberland, is the south fork running into the Cumberland about 170 miles above Nashville. At Hopewell, the Cumberland River was treated as the southern boundary referred to, by the deed to Henderson and Company; this, however, may have been inaccurate; the top of the ridge dividing the waters of the Tennessee and Cumberland rivers was the western boundary claimed by the Cherokees; and it is not probable that they intended to retain the narrow strip of land between the top of the ridge and the Cumberland River. That this ridge was the true western boundary before 1779, appears from the following facts:—

When the map was furnished at Hopewell, the sale to Henderson was disregarded and the original western boundary given, "from the beginning of time," within the expression used in the deed to Henderson and Co. It was returned to the war office of the United States, a copy of which is found, and was produced on behalf of the complainant, in the American State Papers, vol. 1, p. 40, *published by the authority of congress, edited by the secretary [*119] of the senate and clerk of the house of representatives, and published in 1832. On this map the Cherokees laid down their western limits, beginning at the mouth of Duck River, then to the ridge between the Cumberland and Tennessee rivers; then down said ridge to the Ohio, and up the same. At the treaty, Tassel, on behalf of the Cherokees, said: "We will mark a line for the white people; we will begin at the ridge between the Tennessee and Cumberland, on the Ohio, and run along the same, till we get round the white people as you think proper. We will mark a line from the mouth of Duck River to the said line, and leave the remainder of the lands to the south and west of the lines to the Chickasaws." And according to this the Chickasaw limits to the east were recognized by the parties to the Cherokee treaty, in the absence of the Chickasaws. 1 State Papers, 43.

In January, 1786, the Chickasaws made their appearance at tk

treaty ground at Hopewell. They agreed on the lines, from the mouth of Duck River to the ridge; and then with it to the Ohio, as the boundary between themselves and the whites, 1 State Papers, 57; and to which, the treaty made with them, on the 10th of January, 1786, corresponded. It does not appear any of the Cherokees were present.

In August, 1792, Wm. Blount, governor of the southwestern territory, and superintendent of Indian affairs, for the southern district, and General Pickens, met the Chickasaws, Choctaws, and Cherokees, represented by chiefs, at Nashville, by order of the United States, for the purpose of securing friendly relations with these tribes. Every Chickasaw, chief was there except three. John Thompson, interpreter, and two chiefs, attended on part of the Cherokees. 1 State Papers, 284. General Pickens had been one of the commissioners on part of the United States at Hopewell; and Gov. Blount, the agent at said treaty for North Carolina, and a witness to it. Piomingo, for the Chickasaws, handed a letter from President Washington, which he had received by Mr. Doughty, and a map of the country made at Hopewell, showing the line established by the treaty; the map being opened and explained, Wolf's friend said the line between the Chickasaw and the United States was right. The map being worn and old, a copy was made, and furnished to the Indians.

Piomingo then said: "I will describe the boundaries of our land; it begins on the Ohio, at the ridge which divides the waters of Tennessee and Cumberland, and extends with that ridge, east-
[*120] wardly as far as the most eastern waters of Elk River; then south, &c., crossing the Tennessee River at the Chickasaw old field." This is opposite the heads of Elk.

Piomingo then addressed the Cherokees, and said: "At the treaty of Holston,¹ 1791, I am told the Cherokees claimed all Duck River. I want to know if it is so?"

Nontuaka, for the Cherokees, replied: "It is true. I told the President so, and, coming from him, told my nation so. I never knew before the present, that our people divided land and made lines like the white people."

Piomingo replied: "I am the man who laid off the boundary on that map; and, to save my own land, I made it plain: I know the fondness of the Cherokees to sell land." Nontuaka replied: "As to the boundary, I do not look at it. The President advised us to let one line serve for the four nations; he would never ask for any more land south of it, nor suffer others; and all the hunting-ground within said boundary should be for the four nations."

¹ 7 Stats. at Large, 39.

To this the Chickasaw chief replied : " By marking my boundary, I did not mean to exclude other nations from the benefit of hunting on my lands. I knew the Cherokees had often pretended to take the whites by the hand, but instead of doing it in good faith, they are always sharpening their knives against them. I feared the whites, in retaliation, would fall on the Cherokees, and they might take my land, supposing it belonged to the Cherokees; for this reason I have marked it." The Chickasaws then promised to furnish the Cherokees with a copy of their map; and this was afterwards done.

John Thompson then said: " We (the Cherokees) do not find fault with the line between the white people and the Chickasaws, nor with the place where the Chickasaws' line crosses the Tennessee; but I have not before been so fully informed of the claim of the Chickasaws." 1 State Papers, 286.

In regard to the line on the ridge, from the Cherokee corner north, to the Ohio, in our opinion, it may be safely affirmed that, so far as the contracts, treaties, and admissions of the Cherokees furnish evidence as part of the history of the country, the lands west of that line belonged to the Chickasaws in 1779, when the Virginia land law was passed; and that this is confirmed in a remarkable degree, by the treaty of Hopewell with the Chickasaws, and the intercourse had with them respecting that line, then, and afterwards.

That Virginia so understood it, can hardly be doubted. In the winter of 1779-80, Walker's line was run, establishing [* 121] the boundary between Virginia and North Carolina; it was marked to the Tennessee River, and the latitude of 36.30 north taken on the Mississippi River; the history of it will be seen in the case of *Fleeger v. Pool*, 11 Pet. 185. This led to the discovery that the southern boundary of Virginia ran much further north than she had apprehended. The officers and soldiers had had assigned to their exclusive appropriation the lands south of Green River acquired by the deed of Henderson and Company; a great portion of the best part supposed to belong to Virginia before Walker's line was run, having fallen south of that line, the act of 1781, after reciting the fact, declared: that all that tract of land included within the rivers Mississippi, Ohio, Tennessee, and the Carolina boundary line, shall be and the same is hereby substituted in lieu of such lands so fallen into the said State of North Carolina, to be claimed in the same manner by the officers and soldiers as the lands south of Green River; and the act prescribes the mode of locating them. By virtue of this law, Porterfield's entries were made. Four years before the act of 1781 was passed, the Long Island treaty of 1777, had been made with the Cherokees by

Virginia; it was in full force in 1781, when the military claimants were let in to locate on the country. When we consider the strong terms of protection imposed on Virginia by the treaty; the integrity and elevation of character of its people; the danger of resentment on the part of the Indians; it is hardly possible to believe that so gross an infraction of the treaty was intended, as the appropriation of the country in question necessarily involved.

With the Chickasaws, at that day, Virginia had not had any intercourse; these lands lay far off from the residence of the Chickasaws, and were mere hunting grounds. Virginia might not have known, and we suppose did not know to any degree of certainty, that they belonged to this tribe, or what Indians claimed them, either in 1779 or 1781. But we repeat: one thing is certain, that Virginia treated the lands as subject to appropriation in 1781, which she could not have done without forfeiting her honor, and breaking her treaty, had they been Cherokee lands; and we feel great confidence she intended to do neither. The treaty of 1777 was equally in force in 1781 as in 1779.

The opinion of the court of appeals in 1791, is conclusive to the point, that if the land in dispute was not Cherokee country, it was not within the exception of the land law of 1779; and that [* 122] Clark's * title is good, as all the lands in the commonwealth not excepted, were subject to appropriation on treasury warrants, although claimed by Indians whose lands were not protected from location by statute.

It is next insisted that as there was no other country in Virginia belonging to any tribe of Indians in the west, the reservation must have referred to that west of Tennessee River. However imposing this argument may seem, it is easily explained, when we recollect that in 1779 it was unknown where the southern boundary of Virginia was. The question is, what limits did she assume as hers at that time? The Long Island treaty line of 1777, ran down the Holston to the mouth of Cloud's Creek, and then to a point below Cumberland Gap. Up to these boundaries the Virginians had settled; and west of it they were prohibited from going; the country for half a degree south of Walker's line was in the possession of Virginia; she had Fort Henry there, and governed it. Lands were located and enjoyed under her laws south of Walker's line, east of the line running from the mouth of Cloud's Creek to the mountain; and had the Cherokee country west of the line not been excepted from location, her people would have broken the treaty and obtruded on the Cherokees. After the deed of Henderson and Company had been treated as a valid cession to the State, this was the only definite and

established line left between the parties; and the protection of which, excited great anxiety on part of the Indians, as plainly appears by the treaty; it is therefore manifest, the exception in the land law had reference mainly to this line, in support of the treaty as the standing law between the parties to it.

The argument is founded on the fact, that the entire line from the Holston, to Cumberland Gap, fell to North Carolina; as Walker's line runs through the gap, and north of the high point at which the line terminates; but for the reasons stated, it proves nothing, when explained by the mistake under which Virginia labored in regard to her southern boundary, before Walker's line was run. Had the legislature declared no location should be made west of the Cherokee line, then there would be no difficulty in saying what line was meant; as there was then no recognized Cherokee line in the assumed limits of Virginia but the one from Holston River to the mountain. It is therefore almost as certain this was the line alluded to in the exception of the act of 1779, as if the legislature had said so.

To prove that the Cherokees did own the country west of Tennessee River near its mouth, the deposition of Peter Force is introduced on part of the complainant. The witness expresses [* 123] it as his opinion that the land in dispute in 1779 belonged to the Cherokees. This opinion is founded on books, maps, treaties, and other papers, in his possession, and supposed by him to be authentic, which for many years he had been collecting as connected with the history of the United States, from the settlement of the colonies to the adoption of the federal constitution, pursuant to a contract made in 1833 with the secretary of state, under the authority of an act of congress for the publication of these papers. A portion of them are given; and among the number different maps of the country west of the Alleghany Mountains, including the country on the rivers Ohio, Tennessee, and Mississippi, from about the 34th degree to about the 38th of north latitude.

Most of these maps have statements on them that the country west of Tennessee River was Cherokee land: "Country of the Cherokees," &c., being marked on the maps. They were published at different periods previous to the Revolution; the most respectable of them, that of Mitchell, in 1755. The physical geography of the country was obviously little understood, as the maps are very imperfect, and no authority for this purpose at the present day, where any degree of accuracy is required. The only documentary evidence produced by Mr. Force to show the residence of the Cherokees, is found in the report in the proceedings to the British government, of Sir Alexander Cuming, who visited the Cherokees in the spring of

1730, obtained their submission to the crown, and took to England some of their chiefs, to ratify a treaty there with the lords commissioners of trade and plantations. This treaty describes no boundaries, but is one of amity, and contains stipulations that the Cherokees in future shall be subject to the sovereignty of the British crown. Sir Alexander visited the Indian towns on the Keowee where the treaty of Hopewell was made, and went north to Tellico where the King Moytoy resided, and got his submission, and the surrender of his crown. This town, Tellico, was near the Tennessee River, where it first takes the name; and is in what is now Monroe county, Tennessee, more than three hundred miles from the land in dispute. It continued to be an Indian town until the treaty of 1819,¹ when the Cherokees extinguished their title to the country there.

In January, 1793, Governor Blount, the superintendent of Indian affairs in a letter to the secretary of war, gives an account of the places of residence of the Cherokees at the beginning, and [* 124] previous to the Revolution. He says they lived in towns either on the head waters of the Savannah River, (Keowee and Tugelo,) or on the Tennessee above the mouth of Holston. He then proceeds to prove that the lands sold to Henderson and Company did not belong to the Cherokees; and also that the lands formerly sold by them to Henderson and Company, lying on the Cumberland, belonged to the Chickasaws, that the Cherokees had only sold their right to them as a common hunting-ground, and that Virginia had previously purchased them from the northern Indians. And if he is not mistaken, in his representation of the facts and admissions of the Cherokees, stated in his letters of November, 1792, and January, 1793, he does prove, that to the lands sold to Henderson and Company north of Cumberland River, the Cherokees had no title when they made the deed; and that they so admitted, and that the lands ceded by them south of that river by the treaty of Hopewell, belonged to the Chickasaws; or, at least, that this tribe had a better founded claim to them than the Cherokees. Copies of the letters are found in the State Papers, vol. 1, pp. 325, 431.

We think that not much reliance can be placed on any thing contained in Mr. Force's deposition; and that the conclusion Governor Blount formed, is contrary to what Virginia admitted by the treaties of Hard Labor, and Lochaber, and by taking title under the deed of Henderson and Company; this deed is in conformity to the foregoing British treaties made with the Cherokees previous to the Revolution, and especially that of 1770, of Lochaber; according to which,

¹ 7 *Stata. at Large*, 195.

the eastern Cherokee line in Virginia was established from a point six miles above the Long Island in Holston; thence through Cumberland Gap, to the head of Kentucky River, and down the same to the Ohio. Virginia never set up any assumptions to the contrary of this being the true line as run by Col. Donelson, by whose name it was known. Nor could the United States be heard to disavow the Cherokee title recognized by the treaty of Hopewell to the lands lying south of Cumberland River, and recognized as theirs by that treaty.

And in this connection, we take occasion to say nothing short of the clearest proof, would induce this court, after the lapse of nearly sixty years, to hold otherwise than that the Chickasaw line, established by the treaty of Hopewell, from the Cherokee corner to the Ohio River, was conclusive that it was the true line of that people, anterior to any date known to Virginia as a commonwealth.

As to *the United States, it was assuredly conclusive; the [*125] treaty not being one of cession; and as to the Cherokees, acquiescence from 1785 to 1819, when the United States acquired the Chickasaw title, it ought to conclude them, unless their superior title was plainly and conclusively proved; and the delay in not asserting it, accounted for in a satisfactory manner. The same proof is required of the complainant, in which we think he has altogether failed.

The defendants proved themselves to have been more than seven years in possession under Clark's patent before the suit was brought, and therefore rely on the statute of limitations of Kentucky as a defence.

The statute in terms bars suits in equity as well as actions at law where seven years adverse possession has been held. This court pronounced it no violation of the compact between Virginia and Kentucky in the case of *Hawkins v. Barney*, 5 Pet. 457. And so Kentucky has often held. It applies to suits where the plaintiff claims under a patent, survey, or entry, against an adverse title set up under another patent, survey, or entry. The defendant's title must be connected, and deducible of record from the commonwealth, which means a connected title when tested by its own derivation. On this the bar may be founded, although it be the younger and void, when contrasted with the plaintiff's elder patent. *Skyles v. King*, 2 Alex. Marshall, 387. But the statute does not bar a legislative grant, 3 Monroe, 161, and it is insisted for the complainant the acts of Virginia vested in the officers and soldiers an equitable title, which was anterior to Porterfield's entries and patents, and independent of them on which the bill can be sustained, and there-

fore no bar can be interposed. The rule in this court is settled that each State has the right to construe its own statutes; and especially those barring titles. In the case of *Green v. Neal*, 6 Pet. 291, it was held that this court uniformly adopted the decisions of the state tribunals respectively, in constructing their statutes; that this was done as a matter of principle in all cases where the decisions of the state court has become a rule of property. This rule was adopted in *Harpending v. The Dutch Church*, and has been in many other cases, 16 Pet. 455, and cannot be departed from. The land laws of Virginia are just as much the laws of Kentucky, as they were the laws of Virginia in that country before the separation. By the decisions of the court of appeals of Kentucky, it is settled, and has not been open to question for many years, that an entry [*126] was required to *give title on a military warrant in the military district; and that all the specialty, &c., to give it validity, was imposed on the enterer, as if it had been made on a treasury warrant, each being governed by the provisions of the act of 1779. *McIlhenney v. Biggerstaff*, 3 Littel, 161. This form was pursued by Porterfield, and was the only means by which he could acquire an individual title that could be enforced in a court of justice, although he had a common interest in the lands pledged for the satisfaction of his claim, that could be made available through the medium of the land-office. His claim, as set forth in the bill, was, therefore, subject to be barred. By the proof it is barred, and for this reason also the bill must be dismissed.

As it was urged, on part of the complainant with much earnestness, that the act of 1809 was never intended to apply to the land in dispute, then covered by the Chickasaw title, and protected by the treaty of Hopewell, it is deemed proper to express briefly our opinion on the ground assumed. George R. Clark had mortgaged the land long before the treaty of 1819 was made; therefore it was subject to sale before the Indian title to occupancy was extinguished, so the *caveat* suit was decided first in Virginia in 1791, and ultimately in Kentucky in 1793, after the treaty of Hopewell, therefore the title could be litigated. In 1795, a patent issued to Clark pursuant to a statute of Kentucky of the previous year, general in its terms. It follows the land laws extended to the country, so far as the inhibitions of the treaty would permit, or the patent could not have issued.

Kentucky legislated for her entire territory, subject to the restrictions imposed by the treaty, which that State recognized as the paramount law until its restrictions were removed by the treaty of cession, when the act of 1809, and all the other laws of Kentucky, had effect west of Tennessee River, and operated alike in all parts of the State.

For the foregoing reasons, the decree of the circuit court dismissing the bill, is ordered to be affirmed.

6 Wal. 582.

FRANÇOIS FENELON VIDAL, JOHN F. GIRARD, and others, Citizens and Subjects of the Monarchy of France, and HENRY STUMP, Complainants and Appellants, v. THE MAYOR, ALDERMEN, AND CITIZENS OF PHILADELPHIA, the Executors of STEPHEN GIRARD, and others, Defendants.

2 H. 127.

The corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust.

The 32 & 34 Hen. VIII. disabling corporations to take by devise, is not in force in Pennsylvania. Though the 43 Eliz. c. 4, is not in force in Pennsylvania, its conservative provisions are recognized, and charitable devises are not void in that State, on account of the inability of the trustee to take, or of the uncertainty of the beneficiaries.

A devise upon a trust to establish and maintain a college for the education of indigent orphan boys, is a charitable bequest, although the will of the testator excludes all ecclesiastics, missionaries, and ministers of all sects, from exercising any trust or duty concerning the college, and from admission for any purpose, or as visitors, within its precincts.

APPEAL from the circuit court of the United States for the eastern district of Pennsylvania. The appellants, who were heirs at law and next of kin of Stephen Girard, filed their bill against his executors, and other heirs, to set aside so much of his will as devised and bequeathed the property therein mentioned to found and support a college. The material parts of the will were as follows.

* After sundry legacies and devises, the will proceeds thus: [* 129]

XX. And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds, and the developments of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children as can be trained in one institution, a better education, as well as a more comfortable maintenance than they usually receive from the application of the public funds; and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the River Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior. Now, I do give, devise, and bequeathe all the residue and remainder of my

real and personal estate of every sort and kind wheresoever situate, (the real estate in Pennsylvania charged aforesaid,) unto "the Mayor, Aldermen, and Citizens of Philadelphia," their successors and assigns, in trust, to and for the several uses, intents, and purposes hereinafter mentioned and declared of and concerning the same, that is to say: so far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said mayor, aldermen, and citizens of Philadelphia, or their successors, but the same shall forever thereafter be let from time to time, to good tenants, at yearly, or other rents, and upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and liberties of Philadelphia constantly in good repair, (parts elsewhere situate to be kept in repair by the tenants thereof respectively,) and towards improving the same, whenever necessary, by erecting new buildings, and that the net residue (after paying the several annuities hereinbefore provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate; and so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Brumley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are [*130] *herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting, as soon as practically may be, in the centre of my square of ground between High and Chestnut streets, and Eleventh and Twelfth streets, in the city of Philadelphia, (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever, a permanent college, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design.

The said college shall be constructed with the most durable materials, and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength, convenience, and neatness of the whole. It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be

built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles. It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice. It shall be fire-proof inside and outside. The floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows, and shutters. Cellars shall be made under the whole building, solely for the purposes of the institution, &c., &c., &c., (and then follows a long and exceedingly minute description of the manner in which the building shall be erected.)

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution, the income, issues, and profits of so much of the said sum of two millions of dollars as shall remain unexpended, shall be applied to maintain the said college according to my directions.

1. The institution shall be organized as soon as practicable, and to accomplish that purpose more effectually, due public notice of the *intended opening of the college shall be [*131] given, so that there may be an opportunity to make selections of competent instructors and other agents, and those who may have the charge of orphans may be aware of the provisions intended for them.

2. A competent number of instructors, teachers, assistants, and other necessary agents, shall be selected, and when needful, their places from time to time supplied. They shall receive adequate compensation for their services; but no person shall be employed who shall not be of tried skill in his or her proper department, of established moral character, and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars useful to be known of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian or other competent authority shall

have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors, or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring, and at all future times, priority of application shall entitle the applicant to preference in admission, all other things concurring; but if there shall be, at any time, more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given—first, to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York, (that being the first port on the continent of North America at which I arrived;) and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and, subsequently as master and part-owner of a vessel and cargo.

[*132] *7. The orphans admitted into the college shall be there fed with plain but wholesome food, clothed with plain but decent apparel, (no distinctive dress ever to be worn,) and lodged in a plain but safe manner; due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation. They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages, (I do not forbid, but I do not recommend the Greek and Latin languages,) and such other learning and science as the capacities of the several scholars may merit or warrant. I would have them taught facts and things, rather than words or signs; and especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans admitted into the college shall, from mal-conduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the mayor, aldermen,

and citizens of Philadelphia, or under their direction, to suitable occupations, as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively, consulting, as far as prudence shall justify it, the inclinations of the several scholars, as to the occupation, art, or trade to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the mayor, aldermen, and citizens of Philadelphia, and their successors; and I do so with the more confidence, as, from the nature of my bequests, and the benefit to result from them, I trust that my fellow-citizens of Philadelphia will observe and evince especial care and anxiety in selecting members for their city councils, and other agents.

There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which * my bequest for said college is made and to be enjoyed, [* 133] namely. First, I enjoin and require, that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively. Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

If the income arising from that part of the said sum of \$2,000,000

remaining after the construction and furnishing of the college and out-buildings, shall, owing to the increase of the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings, and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund, hereinafter expressly referred to, for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill Navigation [* 134] Company, * my design and desire being that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of \$500,000, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say; (then follows an enumeration of the objects to which the income of the fund is to be applied, being the improvement of the eastern part of the city.)

XXIII. I give and bequeathe to the commonwealth of Pennsylvania, the sum of \$300,000, for the purpose of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect the several improvements above specified, namely: 1. Laws, to cause Delaware Avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing, to be abated and removed, and to prohibit the creation of any such obstructions to the eastward of said Delaware Avenue. 2. Laws, to cause all wooden buildings, as above described, to be removed, and to prohibit their future erection within the limits of the city of Philadelphia. 3. Laws, providing for the gradual widening, regulating, paving, and curbing Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified, all which objects may, I persuade myself, be accomplished on principles at once just in relation to individuals, and highly beneficial to the public; the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interest and income thereof from time to time, so that the whole shall form a permanent fund, and to apply the income of the said fund:—

1. To the further improvement and maintenance of the aforesaid college, as directed in the last paragraph of the XXIst clause of this will.

* 2. To enable the corporation of the city of Philadelphia [* 135] to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen, really suited to the purpose; and to this end, I recommend a division of the city into watch districts, or four parts, each under a proper head, and that at least two watchmen shall, in each round or station, patrol together.

3. To enable the said corporation to improve the city property, and the general appearance of the city itself, and, in effect, to diminish the burden of taxation, now most oppressive, especially on those who are the least able to bear it.

To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year forever, after providing for the college as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinbefore and hereinafter mentioned, then I give and bequeathe the said remainder and accumulations to the commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues, and profits of my real estate in the city and county of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the XXIst clause of this will. And if the commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise, and bequeathe the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to the mayor,

aldermen, and citizens of Philadelphia, are made upon the following express conditions, that is to say. First, That none of the moneys, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever, than those herein mentioned and appointed.

Second, That separate accounts, distinct from the other [*136] *accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college, and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature, as hereinafter mentioned, that my intentions had been fully complied with. Third, That the said corporation render a detailed account annually, in duplicate, to the legislature of the commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate, and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said college, and shall submit all their books, papers, and accounts, touching the same, to a committee or committees of the legislature for examination, when the same shall be required.

Fourth. The said corporation shall also cause to be published in the month of January, annually, in two or more newspapers, printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars and other particulars needful to be publicly known, for the year next preceding the said month of January, annually. This will was dated February 16, 1830.

[*137] * Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16th, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township; now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate, so

purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose — consequently, the said square of ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes, as are declared in section twenty of my will, it being my intention that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section.

In witness whereof, I, the said Stephen Girard, set my hand and seal hereunto, the twentieth day of June, eighteen hundred and thirty-one.

STEPHEN GIRARD. [L. S.]

The grounds upon which the bill rested appear in the opinion of the court.

Jones and Webster, for the appellants.

Binney and Sergeant, contra.

* STORY, J., delivered the opinion of the court. [* 183]

This cause has been argued with great learning and ability. Many topics have been discussed in the arguments, as illustrative of the principal grounds of controversy, with elaborate care, upon which, however, in the view which we have taken of the merits of the cause, it is not necessary for us to express any opinion, nor even to allude to their bearing or application. We shall, therefore, confine ourselves to the exposition of those questions and principles which, in our judgment, dispose of the whole matters in litigation; so far at least as they are proper for the final adjudication of the present suit.

The late Stephen Girard, by his will dated the 25th day of December, A. D. 1830, after making sundry bequests to his relatives and friends, to the city of New Orleans, and to certain specified charities, proceeded in the 20th clause of that will to make the following bequest, on which the present controversy mainly hinges. "XX. And whereas I have been for a long time impressed," &c. [See *ante*, p. 61.]

The testator then proceeded to give a minute detail of the plan

and structure of the college, and certain rules and regulations for the due management and government thereof, and the studies to be pursued therein, "comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French [* 184] *and Spanish languages," (not forbidding but not recommending the Greek and Latin languages,) "and such other learning and science as the capacities of the several scholars may merit or warrant." He then added: "I would have them taught facts and things rather than words or signs; and especially I desire that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars."

The persons who are to receive the benefits of the institution he declared to be, "poor white male orphans between the ages of six and ten years; and no orphan should be admitted until the guardians or directors of the poor, or other proper guardian, or other competent authority, have given by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors or others by them appointed, to enforce in relation to each orphan every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution." The testator then provided for a preference, "first, to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York; and lastly, to those born in the city of New Orleans." The testator further provided that the orphan "scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age."

The testator, then, after suggesting that, in relation to the organization of the college and its appendages, he leaves necessarily many details to the mayor, aldermen, and citizens of Philadelphia, and their successors, proceeded to say: "There are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: First, I enjoin and require," &c. [See *ante*, p. 65.] This second injunction and requirement is that which has been so elaborately commented on at the bar, as derogatory to the Christian religion, and upon which something will be hereafter suggested in the course of this opinion.

The testator, then, bequeathed the sum of \$500,000 to be invested, and the income thereof applied to lay out, regulate, and light

and pave a passage or street in the east part of the city of Philadelphia, fronting the River Delaware, not less than twenty-one feet wide and to be called Delaware Avenue, &c.; and to this intent to obtain such *acts of assembly, and to make such [* 185] purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, &c., &c.; and he proceeded to give other minute directions touching the same.

The testator then bequeathed to the commonwealth of Pennsylvania the sum of \$300,000 for the purpose of internal improvement by canal navigation, to be paid into the state treasury as soon as such laws shall be enacted by the legislature to carry into effect the several improvements before specified, and certain other improvements.

The testator then bequeathed the remainder of the residue of his personal estate in trust to invest the same in good securities, &c., so that the whole shall form a permanent fund, and to apply the income thereof to certain specified purposes, which he proceeds to name; and then said: "To all which objects," &c. [See *ante*, p. 67.]

These are the material clauses of the will which seem necessary to be brought under our review in the present controversy. By a codicil dated the 20th of June, A. D. 1831, the testator made the following provision: "Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township. Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will de-

voted the said estate to said purpose — consequently, the [* 186] said square of ground is to constitute, * and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section twenty of my will ; it being my intention, that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section.” The testator died in the same year ; and his will and codicil were duly admitted to probate on the 31st of December of the same year.

The legislature of Pennsylvania passed the requisite laws to carry into effect the will, so far as respected the bequests of the \$500,000 for the Delaware Avenue and the \$300,000 for internal improvement by canal navigation, according to the request of the testator.

The present bill is brought by the heirs at law of the testator, to have the devise of the residue and remainder of the real estate to the mayor, aldermen, and citizens of Philadelphia, in trust as aforesaid to be declared void, for the want of capacity of the supposed devisees to take lands by devise, or if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust ; and because the objects of the charity for which the lands are so devised in trust are altogether vague, indefinite, and uncertain, and so no trust is created by the said will which is capable of being executed or of being cognizable at law or in equity, nor any trust estate devised that can vest at law or in equity in any existing or possible *cestui que trust* ; and therefore the bill insists that as the trust is void, there is a resulting trust thereof for the heirs at law of the testator ; and the bill accordingly seeks a declaration to that effect and the relief consequent thereon, and for a discovery and account, and for other relief.

The principal questions, to which the arguments at the bar have been mainly addressed, are, First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college upon the trusts and for the uses designated in the will. Secondly, whether these uses are charitable uses, valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania. Thirdly, if not, whether, being void, the fund falls into the residue of the testator's estate, and belongs to the corporation of the city, in virtue of the residuary clause in the will ; or it belongs, as a resulting or implied trust to the heirs and next of kin of the testator.

As to the first question, so far as it respects the capacity

of the * corporation to take the real and personal estate, [* 187] independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The act of 32 and 34 Henry VIII, respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The act of 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the mayor, aldermen, and citizens of Philadelphia, shall have perpetual succession, "and they and their successors shall at all times forever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements, and hereditaments, liberties, franchises and jurisdictions, goods, chattels, and effects to them and their successors forever, or for any other or less estate," &c., without any limitation whatsoever as to the value or amount thereof, or as to the purposes to which the same were to be applied, except so far as may be gathered from the preamble of the act, which recites that the then administration of government within the city of Philadelphia was in its form "inadequate to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness; and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, rigorous, and effective powers of government than at present established." Some, at least, of these objects might certainly be promoted by the application of the city property or its income to them — and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trusts should not be deemed within the true scope of the city charter and protected thereby.

But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, namely, the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same * manner and to the same extent as a private per- [* 188] son may do. It is true that, if the trust be repugnant to,

or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities; but a single case may suffice. In *Sonley v. The Clockmaker's Company*, 1 Bro. Ch. R. 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clockmaker's Company, in trust to sell for the benefit of the testator's nephews and nieces. The devise being to a corporation, was, by the English statute of wills, void, that statute prohibiting devises to corporations; and the question was, whether the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron Eyre, in his judgment, said, that although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named. Now, this was a case not of a charitable devise, but a trust created for nephews and nieces; so that it steers wide from the doctrines which have been established as to devises to corporations for charities as appointments under the statute of 43 Elizabeth; *à fortiori*, the doctrine of this case must apply with increased stringency to a case where the corporation is capable at law to take the estate devised, but the trusts are utterly *dehors* the purposes of the incorporation. In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. In the case of *Green v. Rutherford*, 1 Ves. 462, a devise was made to St. John's College, in Cambridge, of the perpetual advowson of a rectory in trust, that whenever the church should be void and his nephew be capable of being presented thereto, they should present him; and on the next avoidance should present one of his name and kindred; if there should be any one capable thereof in the college; if none [* 189] such, they should present the *senior divine then fellow of the college, and on his refusal the next senior divine, and so downward; and, if all refused, they should present any other person they should think fit. Upon the argument of the cause, an objection was taken that the case was not cognizable in a court of equity, but

fell within the jurisdiction of the visitor. Sir John Strange, (the master of the rolls,) who assisted Lord Hardwicke at the hearing of the cause, on that occasion said: "A private person would, undoubtedly, be compellable to execute it (the trust); and, considered as a trust, it makes no difference who are the trustees, the power of this court operating on them in the capacity of trustees. And though they are a collegiate body, whose founder has given a visitor to superintend his own foundation and bounty; yet as between one claiming under a separate benefactor and these trustees for special purposes, the court will look on them as trustees only, and oblige them to execute it under direction of the court." Lord Hardwicke, after expressing his concurrence in the judgment of the master of the rolls, put the case of the like trust being to present a member of another college, and held that the court would have jurisdiction to enforce it.

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a State where the statutes of mortmain do not exist, (as they do not in Pennsylvania,) the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of \$1,000,000, for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the River Schuylkill, (an object which some thirty or forty years ago would have been thought of transcendent benefit,) why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, * and within the scope of the legitimate pur- [* 190] poses of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable)

now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the State. We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania.

It is manifest that the legislature of Pennsylvania acted upon this interpretation of the charter of the city, in passing the acts of the 24th of March, and the 4th of April, 1832, to carry into effect certain improvements and execute certain trusts, under the will of Mr. Girard. The preamble to the trust act, expressly states that it is passed "to effect the improvements contemplated by the said testator, and to execute, in all other respects, the trusts created by his will," as to which, the testator had desired the legislature to pass the necessary laws. The tenth section of the same act, provides, "That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in the said will, &c., &c.; to carry which into effect," the testator had desired the legislature to enact the necessary laws. But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of the college, is the provision of the 11th section of the same act, which declares: "That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection [* 191] of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved by a majority of the select and common councils of the city of Philadelphia." The other act is also full and direct to the same purpose, and provides, "That the select and common councils of the city of Philadelphia, shall be and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." Here, then, there is a positive authority conferred

upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentality of agents appointed by them. No doubt can then be entertained, that the legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will.

It is true that this is not a judicial decision, and entitled to full weight and confidence as such. But it is a legislative exposition and confirmation of the competency of the corporation to take the property and execute the trusts; and if those trusts were valid in point of law, the legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts, either upon a *quo warranto* or any other proceeding, by which it should seek to divest the property, and invest other trustees with the execution of the trusts, upon the ground of any supposed incompetency of the corporation. And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively belong to the State in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a *quo warranto*, or other proper judicial proceeding. In this view of the matter, the recognition and confirmation of the devises and trusts of the will by the legislature, are of the highest importance and potency.

We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance *and relief of the poor, sick, and impotent, [*192] charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

The statute of the 43 of Elizabeth, c. 4, has been adjudged by the supreme court of Pennsylvania not to be in force in that State. But then it has been solemnly and recently adjudged by the same court, in the case of *Zimmerman v. Anders*, (January term, 1843, 6 W. & S. 218,) that "it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions." "These have been in force

here by common usage and constitutional recognition ; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." Nor is this any new doctrine in that court ; for it was formally promulgated in the case of *Witman v. Lex*, 17 Serg. & Rawle, 88, at a much earlier period, (1827.)

Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. In the next place, it is said, that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void, and the property results to the heirs. And in support of this argument we are pressed by the argument that charities of such an indefinite nature are not good at the common law, (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges,) and hence the charity fails ; and the decision of this court in the case of *The Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of Virginia, in which State the statute of 43 Elizabeth, c. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in

succession for the purposes of the trust, and the beneficiaries also were also uncertain and indefinite. * Both circumstances, therefore, concurred ; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon that occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth, c. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights, (certainly in no small degree shadowy, obscure, and flickering,) the court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather, where both of these defects occurred. The court said : " We find no *dictum* that charities could be established on such an information (by the

attorney-general) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." In reviewing the authorities upon that occasion, much reliance was placed upon Collison's case, Hobart, 136; (S. C. cited Duke on Charities, by Bridgman, 368, Moore, 888,) and Platt v. St. John's College, Cambridge, Finch. .221; (S. C. 1 Cas. in Chan. 267, Duke on Charities, by Bridgman, 379,) and the case reported in 1 Chancery Cases, 134. But these cases, as also Flood's case, Hob. 136, (S. C. 1 Equity Abridg. 95, pl. 6,) turned upon peculiar circumstances. Collison's case was upon a devise in 15 Henry VIII., and was before the statute of wills. The other cases were cases where the donees could not take at law, not being properly described, or not having a competent capacity to take, so that there was no legal trustee; and yet the devises were held good as valid appointments under the statute of 43 Elizabeth. The *dictum* of Lord Loughborough in Attorney-General v. Bowyer, 3 Ves. 714, 726, was greatly relied on, where he says: "It does not appear that this court at that period (that is, before the statute of wills) had cognizance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting, (an information to establish a college under a devise before the statute of mortmain of 9 Geo. II. c. 36;) but they made out their case as well as they could at law." In this suggestion, Lord Loughborough had under his consideration Porter's case, 1 Co. 16. But there a devise was made in 32 Henry VIII. to the testator's wife, upon condition for her to grant the lands, &c., in all convenient speed after his decease
*for the maintenance and continuance of a certain free- [*194]
school, and almsmen and almswomen forever. The heir entered for and after condition broken, and then conveyed the same lands to Queen Elizabeth in 34 of her reign; and the queen brought an information of intrusion against Porter for the land in the same year. One question was, whether the devise was not to a superstitious use, and therefore void under the act of 23 Henry VIII. c. 2, or whether it was good as a charitable use. And it was resolved by the court, that the use was a good charitable use, and that the statute did not extend to it. So that here we have a plain case of a charity held good, before the statute of Elizabeth, upon the ground of the common law, there being a good devisee originally, although the condition was broken, and the use was for charitable purposes in some respects indefinite. Now, if there was a good devisee to take as trustee, and the charity was good at the common law, it

seems somewhat difficult to say, why, if no legal remedy was adequate to redress it, the court of chancery might not enforce the trust, since trusts for other specific purposes were then, at least when there were designated trustees, within the jurisdiction of chancery.

There are, however, *dicta* of eminent judges, (some of which were commented upon in the case of 4 Wheat. 1,) which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 of Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute. Such was the opinion of Sir Joseph Jekyll in *Eyre v. Countess of Shaftsbury*, (2 P. Will. 103, 2 Equity Abridg. 710, pl. 2,) and that of Lord Northington in *Attorney-General v. Tancred*, 1 Eden, 10, (S. C. Ambler, 351, 1 Wm. Black. 90,) and that of Lord Chief Justice Wilmot in his elaborate judgment in *Attorney-General v. Lady Downing*, Wilmot's Notes, p. 1, 26, given after an examination of all the leading authorities. Lord Eldon, in the *Attorney-General v. The Skinner's Company*, 2 Russ. 407, intimates in clear terms his doubts whether the jurisdiction of chancery over charities arose solely under the statute of Elizabeth; suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were sustained. Sir John Leach, in the case of a charitable use before the statute of Elizabeth, (*Attorney-General v. The Master of Brentwood* [* 195] *School*, 1 Mylne and Keen, 376,) said: "Although at * his time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute." In point of fact the charity was so decreed in that very case, in the 12th year of Elizabeth. But what is still more important is the declaration of Lord Redesdale, a great judge in equity, in the *Attorney-General v. The Mayor of Dublin*, 1 Bligh New R. 312, 347, (1827,) where he says: "We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, &c.; but the proceedings of that commission were made subject to appeal to the lord chancellor, and he might reverse or affirm what they had done; or make such order as he might think fit for reserving the controlling jurisdiction of the court of chancery as it existed before the passing of that statute; and there can be no doubt that by information by the attorney general the same thing might be done." He then adds, "the right

which the attorney-general has to file an information, is a right of prerogative. The king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." So that Lord Redesdale maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these *dicta* and doctrines, there is the very recent case of the Incorporated Society v. Richards, 1 Drury and Warren, 258, where Lord Chancellor Sugden, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that, which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

Mr. Justice Baldwin, in the case of the will of Sarah Zane, which was cited at the bar and pronounced at April term of the circuit court, in 1833, (see Brightly's N. P. Repts. Magill v. Brown, 346, note,) after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same *conclusion [* 196] in which the district judge, the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the court of chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trus-

tees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the Trustees of the Philadelphia Baptist Association v. Hart's Executors, 4 Wheat. 1, was before this court, (1819,) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may from time to time be applied by the legislature to supply the defects. It is no proof of the non-existence of equitable rights, that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized [* 197] and enforced in the state courts of Pennsylvania, as far as their remedial process would enable these courts to act. This is abundantly established in the cases cited at the bar, and especially by the case of *Witman v. Lex*, 17 Serg. & Rawle, 88, and that of *Sarah Zane's will*, before Mr. Justice Baldwin and Judge Hopkinson. In the former case, the court said: "That it is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid; and were enforced accordingly. The case then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.

This objection is that the foundation of the college upon the prin-

ciples and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same; and secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion.

In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator, (of which indeed we can know nothing,) nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what * is the public policy of a State, [* 198] and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws, and decisions necessarily bring before us.

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790 (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838,) expressly declares: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no

preference shall ever be given by law to any religious establishments or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the supreme court of Pennsylvania in *Updegraff v. The Commonwealth*, 11 Serg. & Rawle, 394.

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out [*199] by clear *and indisputable proof. Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught; but that it is to be impugned or repudiated.

Now, in the present case, there is no pretence to say that any such positive or express provisions exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college; but only, that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor, or officer, or visitor in the college, what legal objection could have been made to such a restriction? And yet, the actual prohibition is in effect the same in substance. But it is asked, why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not, nor whether the history of religion does or does not justify such a sweeping state-

ment; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? Suppose he had excluded all lawyers, or all physicians, or all merchants from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity, as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposition that Christianity *is not to be taught, because ecclesiastics are [*200] not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not laymen instruct in the general principles of Christianity as well as ecclesiastics. There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always be men, not only distinguished for learning and talent, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings which such men, by their conduct, as well as their instructions, may, nay, must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college — its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers? Certainly, there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins, "that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer." Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest

principles of morality be learned so clearly, or so perfectly, as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and, of course, including the best, the surest, and the most impressive. The objection, then, in this

view, goes to this: either that the testator has totally omitted [* 201] to provide for religious instruction in his * scheme of education, (which, from what has been already said, is an inadmissible interpretation,) or that it includes but partial and imperfect instruction in those truths. In either view, can it be truly said that it contravenes the known law of Pennsylvania upon the subject of charities, or is not allowable under the article of the bill of rights already cited? Is an omission to provide for instruction in Christianity in any scheme of school or college education, a fatal defect, which avoids it according to the law of Pennsylvania? If the instruction provided for is incomplete and imperfect, is it equally fatal? These questions are propounded, because we are not aware that any thing exists in the constitution or laws of Pennsylvania, or the judicial decisions of its tribunals, which would justify us in pronouncing that such defects would be so fatal. Let us take the case of a charitable donation to teach poor orphans reading, writing, arithmetic, geography, and navigation, and excluding all other studies and instruction, would the donation be void, as a charity in Pennsylvania, as being deemed derogatory to Christianity? Hitherto, it has been supposed that a charity for the instruction of the poor might be good and valid in England, even if it did not go beyond the establishment of a grammar school. And in America, it has been thought, in the absence of any express legal prohibitions, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty, without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require any thing to be taught inconsistent with Christianity.

Looking to the objection, therefore, in a mere juridical view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are incon-

sistent with the Christian religion, or are opposed to any known policy of the State of Pennsylvania.

This view of the whole matter renders it unnecessary for us to examine the other and remaining question, to whom, if the devise were void, the property would belong, whether it would fall into the residue of the estate devised to the city, or become a resulting trust for the heirs at law.

Upon the whole, it is the unanimous opinion of the court, that the decree of the circuit court of Pennsylvania, dismissing the bill, ought to be affirmed, and it is accordingly affirmed, with costs.

6 H. 801; 9 H. 55; 17 H. 369; 24 H. 465; 7 Wal. 1.

JOHN L. CHAPMAN, Plaintiff, v. HENRY H. FORSYTH and THOMAS LIMERICK, Merchants and Copartners, under and by the Firm, Name, and Style of FORSYTH and LIMERICK, Defendants.

2 H. 202.

Under the Bankrupt Act of 1841, (5 Stats. at Large, 440,) fiduciary debts, contracted before the passage of the act, constitute no objection to the discharge of the debtor from other debts.

A balance, due from a factor to his principal, is not a fiduciary debt within the meaning of that act.

A fiduciary creditor is not affected by proceedings in bankruptcy, unless he has voluntarily come in and proved his debt.

CERTIFICATE of division of opinion of the judges of the circuit court of the United States for the district of Kentucky.

Morehead, for the plaintiff.

Loughborough, contra.

* M'LEAN, J., delivered the opinion of the court. [* 206] .

This was an action of *assumpsit* for the proceeds of 150 bales of cotton, shipped to and sold by defendants as the property of the plaintiff, the defendants being factors. The defendant, Forsyth, pleaded that he had been duly discharged as a bankrupt, on his own voluntary petition. A replication was filed, to which there was a demurrer.

The suit was brought in the circuit court for the district of Kentucky; and, on the argument of the demurrer, the following points were made, on which the opinions of the judges were opposed; and, at the request of the parties, the points were certified to this court.

1. " Could the defendant be discharged as a bankrupt from any

part of his debts on his own petition, when he was indebted in a fiduciary capacity, in part, within the exception in the 1st section of the bankrupt law; that is, were all persons indebted excluded, that held and owed moneys in the capacity of trustees, (as a class,) from the benefit of the act, although they owed other debts besides the moneys held in trust?

2. "Is a commission merchant and factor, who sells for others, indebted in a fiduciary capacity within the act, provided he withholds the money received for property sold by him, and [* 207] which property * was sold on account of the owner, and the money received on the owner's account?

3. "Whether, when the decree of discharge and the regular certificate of being a bankrupt have been obtained, without contest in the district court, they are conclusive and binding on all persons named as creditors by the bankrupt in his petition and list of creditors; and whether a creditor, who did not prove his debt, and to whom the bankrupt was indebted in a fiduciary capacity, can come into court and sue the bankrupt for such fiduciary debt, notwithstanding the decree of discharge and certificate, the debt having been set forth in the petition and list as an ordinary debt, not due in a fiduciary character."

These questions are far less important than they would have been had the bankrupt law not been repealed. But they are still important as affecting a large class of citizens, and to a large amount.

The 1st section of the bankrupt law provides, that "all persons whatsoever, residing in any State, territory, or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," shall, on a compliance with the requisites of the bankrupt law, be entitled to a discharge under it.

The debts here specified are excepted from the operation of the act. This exception applies to the debts, and not to the person, if he owe other debts. The language is, all persons owing debts, not of the description named, may apply, &c. Now, an indebtedment by an individual, not created as above stated, is within the provisions of the act, although he may be under fiduciary obligation. This is the natural import of the provision, and it is sustained by reason. It was proper that congress should not relieve from debts which had been incurred by a violation of good faith, whilst from other obligations a full discharge to the same person should be given. But, to have refused a discharge, because the individual owed a fiduciary debt, would, by withholding a general privilege, have superadded a

penalty to a past transaction without notice. That this consideration influenced the legislature, is shown by the 4th section, which provides, "that no person who, after the passage of the act, shall apply trust funds to his own use," shall be discharged. Now, if a person who owed a fiduciary debt, was not entitled to a discharge from other debts by the 1st section, this provision was useless. A misapplication * of trust funds, as declared, covers the enu- [* 208] merated cases in the 1st section. But, whilst the 1st section only withholds from the jurisdiction of the bankrupt court fiduciary debts, the 4th declares that, if such debts have been contracted subsequent to the law, the individuals shall not be discharged. From this provision, the strongest implication arises, that, if the fiduciary debts were contracted before the passing of the act, the petitioner would, for other obligations, be entitled to a discharge. Viewing, then, the 1st and 4th sections of the act, we are of the opinion that fiduciary debts, contracted before the passage of the act, constitute no objection to a discharge of the same person for other debts.

The second point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act.

If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the 1st section of the act.

The cases enumerated, "the defalcation of a public officer," "executor," "administrator," "guardian," or "trustee," are not cases of implied but special trusts, and the "other fiduciary capacity" mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act.

This view is strengthened, and, indeed, made conclusive by the provision of the 4th section; which declares that no "merchant, banker, factor, broker, underwriter, or marine insurer," shall be entitled to a discharge, "who has not kept proper books of accounts." In answer to the second question, then, we say, that a factor, who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of the act.

The answer of the first question leads necessarily to the answer of the third. For, if fiduciary debts are not within the act, a dis-

charge can in no respect affect the interest of the fiduciary creditor. Without his consent, it is clear, the bankrupt court can take no jurisdiction of his debt. And, although the bankrupt may include the debt in his schedule, and the discharge may be general, yet, as the law gave the court no jurisdiction over the debt, it is not discharged.

The fourth section provides "that the discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under the act, and may be pleaded as a complete bar," &c.

Now, it is supposed that if a fiduciary debt, within the act, be placed upon his schedule by the bankrupt, that it is incumbent on the creditor to preserve his right, by showing, before the bankrupt court, the nature of his debt. And that, consequently, should he fail to appear after notice, he will be barred, as other creditors, by the discharge.

The bankrupt is bound to show on his schedule the nature of his debts, at least so far as to enable the court to take jurisdiction of them. If, for instance, he owe a debt as executor, and he state it on his schedule as an ordinary debt, he commits a fraud on the law, and the discharge cannot avail him. If, in this respect, he suppress the truth, or state falsehood, he is guilty of fraud, and this may be shown against his discharge.

But as the discharge operates only on debts, contracts, &c., which are provable under the act, it is said that consent cannot include fiduciary debts.

Such debts, without the assent of the creditor, are clearly not within the act. But if his debt shall be found on the schedule, and he not only proves it, but receives his proportionate share of the dividend, he is estopped from saying that it was not within the law. He is a privileged creditor, and is not bound by the bankrupt law, but he may waive his privilege. As a creditor he has a right to come into the bankrupt court and claim his dividend. He does not establish his claim as a fiduciary one, but as a debt "provable within the statute." And having done this, he can never controvert the discharge.

From these considerations we are led to say, in answer to the third question, that, unless a fiduciary creditor shall come into the bankrupt court, prove his debt, &c., he is not bound by the discharge, but may sue for and recover his debt from the discharged bankrupt, by showing that it was within one of the exceptions of the first section.

**PETER HARMONY, and others, Claimants of the Brig Malek Adhel,
v. THE UNITED STATES. THE UNITED STATES v. THE CARGO
OF THE BRIG MALEK ADHEL.**

2 H. 210.

Under the 4th section of the act of March 3, 1819, (3 Stats. at Large, 513,) any piratical aggression subjects the vessel to forfeiture, though not made *causa lucri*, and though the owners were entirely innocent, and the vessel was armed for a lawful purpose, and sailed on a lawful voyage.

By the general maritime law, as well as by the legislation of particular countries, vessels are made responsible for the unlawful acts of their masters and crews, and this extends even to forfeitures, by positive law.

Under the act of 1819, the cargo, belonging to an innocent owner, is not forfeited; and this act shows that the policy of this country does not require such a forfeiture under the law of nations.

The matter of costs in the admiralty are not, *per se*, the subject of an appeal; and as they are in the sound discretion of the court, an appellate court should not, ordinarily, interfere with that discretion.

THE case is stated in the opinion of the court, save that the testimony of Myers, read by the judge in delivering the opinion, was as follows:—

* John Myers, a witness, produced and examined on the [* 212] part of the United States, deposes as follows:—

That he was not first mate when he joined The Malek Adhel; Peterson was first mate; witness joined her 23d June, 1840. On Friday, afterwards, Peterson came on board; hauled the vessel out into the stream. On Sunday, Captain Nunez told Peterson to go on shore on account of a quarrel; Peterson was intoxicated; witness was then made first mate; witness told the captain that one of the crew (W. R. Crocker) was competent to go out as second mate, and he was then promoted to that office. On Tuesday, 30th June, took pilot, got under weigh about ten or eleven o'clock that day, and went to sea; discharged the pilot on afternoon of same day; fourth or fifth day out, captain said the chronometer wouldn't speak—had forgotten to wind it up; on the 6th of July, saw a vessel standing to the northward, and we to the eastward, five or six miles apart; ran down to the vessel, and hove maintopsail back; ran to leeward and then to windward of her, and fired a blank cartridge; hailed the vessel, and asked "where from?" they said from Savannah, bound to Liverpool; we hailed her again, and told her to send her boat alongside; she sent her boat, with four men and an officer, and they came alongside; Captain Nunez asked if they had a chronometer; officer in the boat said he did not know whether they had or not; would go on board and see; went on board, and returned in about half an hour with a chronometer; brought it on board, and while we were regulating our

chronometer, our captain and four men went on board the other vessel, which was the "Madras, of Hull;" captain stayed on board a short time, and then returned; they then took their chronometer, and returned to their vessel, The Madras; while we were hoisting our boat up and securing her, The Madras made sail; as soon as the boat was secured, we ran to leeward some distance, and fired another

blank cartridge, but not in the direction of The Madras, and [* 213] then proceeded on our own course. Next, about * 9th or

10th July, a vessel was standing to the westward — we to the eastward; captain said he would run after the vessel, and catch her, as he wanted to send a letter to New York; made sail after her, and finding we did not come up very fast, we fired a blank cartridge; they still not taking any notice, our captain told the men to load a gun with shot; loaded the gun with shot, and fired, when the other vessel hove her maintopsail back; we were about half a mile apart; we both had our American flag flying at first; when the second shot was fired, Captain Nunez ordered the Mexican or Columbian flag to be hoisted; we then hailed; they said they were from Liverpool, bound to Charleston; her name was the brig Sullivan; she was an American vessel; had "Sullivan, New York," on her stern; hailed her, and told her to send a boat alongside; while they were coming, our captain told Martin (called Peter Roberts in the shipping articles) to tell the crew not to speak any English while the boat was alongside; this order the captain first told him in Spanish, then in English; when the boat came alongside, they asked where we were from; captain told Martin, in Spanish, to say we were from Vera Cruz, bound to Barcelona, and out forty-five days; Martin did so; our captain then told him we wanted some lamp-oil; the officer in the other boat said he did not know whether they had any, but he would go on board and see; when they reached their own vessel, they hoisted their boat, and proceeded on their course; we had lamp-oil sufficient to last us twelve months; after they proceeded on their course we made sail likewise; ran to leeward, and fired a shot at her; this fire our captain ordered Martin to make; he (Martin) generally acted as gunner. Martin belonged to Malaga, and spoke Spanish; at the time of second fire, the vessels were about an eighth of a mile apart — hailing distance; we then kept on, and she did the same; the gun was fired at her; we were then standing to eastward — she to westward; did not see where the ball struck.

The next vessel we saw and spoke was The Ten Brothers; this was two or three days after the affair with The Sullivan; passed her without doing any thing. Next vessel we met was the "Vigilant, of Newcastle, England;" spoke her; she showed English colors; hailed

her, and told her to send her boat alongside; she did so. Nunez asked if they had a chronometer; they said they had none; they were out of water, and wanted bread; we gave them two small barrels, and some bread, by our captain's orders; we went on our course. The next vessel we met was The San Domingo, * two days afterwards; our captain was acquainted with the [* 214] passengers on board; he asked them to dine with him, which they did; after they left, Captain Nunez told witness that the passenger had been a slaver, and was just returning from a prosperous voyage; the vessel belonged to Terceira, one of the Western Islands; she was Portuguese; we laid together that night, and the next morning the Portuguese sent on board of us to buy provisions; we then parted company, and two or three days after went into Fayal; Nunez said his intention in going to Fayal was to repair the vessel, and get his chronometer rated; remained there five or six days; had one carpenter employed four days, who did some slight work; he made a side-ladder, and some awning extensions, and put her to her head to find out leak. The principal leak was about eight or ten inches above the water line; the vessel leaked at sea, but not at Fayal; leaked as bad after we left there as she did before; the place of the leak discovered at Rio; there never having been oakum at all in that part of the seam; could put a knife in the seam; leak came into cabin; that leak was not stopped at Fayal.

We took in at Fayal potatoes, bread, and beef, for the use of the crew; we also took in two men as passengers, and a cabin boy; one of the passengers was named Silvie, and the other Curry; the boy is here; the last I saw of the passengers was at Rio; got under weigh from Fayal on Tuesday; do not know whether Nunez knew the two passengers before he saw them at Fayal; came to anchor and waited until Wednesday; there was a pleasure party to come on board to sail about the harbor; in attempting to tack she missed stays — captain at the helm; missed stays a second time; we were about twenty yards from the rocks; Nunez knew nothing of the usages of an American vessel before we left New York; I always worked the vessel myself; Nunez might have known, but he did not speak English well enough to make the men understand. After the sailing-match about the harbor, we left Fayal with the whaling vessel Minerva, from New Bedford; Nunez went on board of her, and took the chronometer to have it rated; had had nothing done with it at Fayal; Nunez knew nothing about managing a chronometer, though it is the captain's duty. Captain Nunez remained on board The Minerva five or six hours; he went on shore at Fayal before we had our sails furled; he went in a shore boat. After Nunez came from The Mi-

nerva we made sail, and proceeded on our course; he brought [* 215] chronometer with him. Next day, we saw a * vessel standing to westward with all sail set, going directly before the wind; we were standing to southward. Nunez ordered to chase her; finding we did not come up very fast we fired, by Nunez's orders, a blank cartridge towards her; she still went on her course. Nunez ordered one of the guns to be shotted, and fired at her, which was done; she then hove her maintop back; we were then about a mile astern of her; we rounded to to fire at her; we came up — hailed her; she said she was from Palermo, bound to Boston; she was The Emily Wilder. Told her to send her boat alongside with their chronometer; they came alongside with the chronometer; we rated ours by it; I rated it, and found a difference of time, and noted it in the log-book. After comparing the time of the two, they then took chronometer and went on board again; I made the entry in the log-book; we each made sail, and stood on our course; they asked us no questions, except where we were from; Nunez said from New York, bounded around Cape Horn. We stood to southward until 4th of August; the day before, captain said he was going to Rio; I told him it was a bad place to go, because it was a rendezvous for American vessels of war. On the 4th of August, Nunez came on deck about half-past seven in the evening, and found fault with some orders witness had been giving, and Nunez told me he did not want me to do more work on board the ship, and I accordingly went off duty; we ran on our course. That night Captain Nunez had the watch from eight to twelve; I heard a noise on board; went up, and saw a vessel close ahead on the weather bow; when we came up Nunez hailed her, and told them to heave the maintop back; they did so, and we did the same; this was about ten o'clock at night; hailed them again, and told them to send their boat aboard of us, with the captain and his papers; this they said they could not do, as their boat leaked, and the night was dark. Nunez then got angry, and told us to double shot the gun; it was done, and fired towards the strange vessel; Martin directed the gun; we were within close hailing distance. Curry, the fore-mentioned passenger, then hailed in English, and told them again to send their boat; the other captain answered in Portuguese or Spanish. Curry told witness that the answer was, "they might sink their brig, but he could not come on board." Nunez then told us to lower our boat, and go on board the strange brig. Curry, Crocker, the second mate, Peter Roberts, (Martin,) John Gray, and Dill or Smith, then went on board the stranger. Curry and Crocker had * 216] each a pair of pistols; they were buckled in a belt * round their bodies; our boat returned in about three quarters of an

hour with Curry and the captain of the strange brig, and three of her men. Curry and the captain came on board The Malek Adhel — the men remained in their boat alongside; the strange captain gave Nunez a tin box with the ship's papers, I believe; ship's papers are carried in such boxes. Curry and Captain Nunez took them down below; strange captain remained on deck; I saw them down the companion-way examining the papers in the cabin; they had them about a quarter of an hour, and then brought them up, and gave them to the Portuguese captain; Nunez spoke English, and told Curry to tell strange captain he must pay \$20 for the shot Nunez had fired at him, and \$10 for a keg of oil which had been knocked over by the recoil of the gun. Nunez also told Curry, in English, to look and see if there were any guns and powder on board the other vessel, and if there were any, to spike the guns, and bring the powder on board, and see if any sweetmeats were on board, and bring them on board also; they then shoved off, Curry with them, and went to the Portuguese vessel. Nunez told me that the Portuguese vessel was from Rio Grande, bound to Oporto, with a cargo of hides and horns; in half an hour after, our boat returned with those who originally went on board the Portuguese vessel, and brought a jar of sweetmeats, one dog, and \$20 for the shot. After the boat was secured, Captain Nunez put me on duty again; this was two o'clock in the morning. Curry told me he had got \$20 for the shot, but was ashamed to ask for the other ten for the oil; I saw Curry give the captain the money in Spanish dollars. Curry said he wouldn't take Brazilian money, which was first offered him by the Portuguese captain; after that we left the vessel, and proceeded on our course. The next vessel we met was on the 10th or 12th of August; they were standing to northward, we to southward; when she came abeam of us, she tacked ship, and went in the same direction with us; in about two hours after we hove our maintop back, and ran foul of each other; Captain Nunez got enraged, and told them to shot the gun, and fire at the stranger; it was done; we fired a second shot; Nunez ordered the second shot.

When the first shot was fired, we were within close hailing distance, and also when each shot was fired; we fired five times, gun shotted each time. After the fifth fire all our powder was gone; Nunez then told Martin something witness did not understand, and Martin then told the crew, he (Captain Nunez) said he would give * \$500 to any volunteers of his crew who would [* 217] go and bring the captain aboard. Nunez asked me to go. I told him I did not like it. He told me not to be afraid, and gave me his dirk. I threw the dirk down on the deck, and said to Nunez, I was afraid to go on board with the boat, for fear they would throw

something in the long boat and sink her, when we were alongside. Nunez said he wanted to bring the other captain on board The Malek, and give him twenty-five lashes; we were then some distance astern. Nunez told Martin to take two men, Dell and Helm, and go on board; they did so, and remained half an hour; they returned, and brought back with them the time. I saw one shot go through the flying jib; it was the second shot. When Martin came back, he told Nunez he must send his chronometer with an officer, and rate it; I took the chronometer, went on board the other vessel, and rated it. Strange captain asked me why Nunez had fired at him. I said I did not know; the captain had ordered it. He asked me where we were bound. I said, "God only knows." When I returned to The Malek Adhel, I told Nunez what had happened, and he laughed. The strange brig was The Albert; she was an English brig, and bound to Rio; her stern sign was disfigured; she had English colors flying. We then proceeded on our course, and made the Brazils about the 20th or 21st of August; the land was some miles north of Cape Antonio. The passengers on board told me they were to go to Bahia. We got to Bahia about six o'clock in the evening, and Curry, Silvie, and the captain went ashore. They came on board again about nine o'clock next morning, and Nunez told me to make ready to clear the cargo, as he was going to repair his vessel. Nunez stayed about half an hour on board, and went ashore again. Next morning got all clear, and about half-past eleven Nunez came on board. The men told me they would do no more work until they saw the American consul; this was told me before Nunez came on board; when he came, I told him; he asked me if I wanted to see the consul too. I said, "Yes." He then said, "Very well, I will go ashore and see." He went on shore, and the next morning between nine and ten o'clock, he came on board again. He told me to tell all the crew who wanted to see the consul, to come aft, and go on the larboard side; the whole crew went on the larboard side, Martin among them. The second mate, Mr. Crocker, and four or five men, went on shore that day; they stayed on shore until about three o'clock, and then returned. Captain Nunez came on board [* 218] * the next morning, and told me the consul wanted to see me, and that I must go on shore with him. We went to the consul's office, and he asked me about these charges. I had kept an account of some small transactions on a piece of paper; I gave it to the consul. The captain said I could be discharged if I desired it; but the consul said, "Not until the affair was settled." By small transactions, witness means the firing, &c. Captain Nunez admitted that it was all right as I had put it down. I told the American

consul the same story as I am now telling. When we were going ashore, Nunez said, "Suppose I sell the brig, how much she worth?" He also said one man had offered to give him \$22,000 for her. I told him I did not know how much she was worth. I stayed on shore until two o'clock, and then went on board again; that night, about one or two o'clock, a vessel ran foul of us, and tore away our jib-boom. The next morning, while we were repairing it, the captain came on board and told me the consul wanted to see me. I went, returned afterwards on board, got my clothes and went ashore, where I remained nine or ten days; went on board, afterwards, the American brig Yankee, and remained there until The Enterprise, a United States schooner, seized and took The Malek and her crew. There were four men shipped by the captain at Bahia, after I left the brig; they were one Portuguese, one Spaniard, one English, and one American. The crew were examined in succession by the consul. We left Bahia on the 26th September, under the charge of Lieutenant Drayton, on board the brig; nine men and two officers were put on board; we then went to Rio; four of our crew were from the schooner Enterprise; we left Martin and the cook behind at Bahia. The day I returned from the consul's on board The Malek, Nunez and the cook had a quarrel, and Nunez struck the cook. Cook said: "When I shipped, I did not know I shipped on board a slaver." I saw Captain Nunez at Rio, in prison. We stayed at Rio from the 2d of October until the 1st of March. We were taken before the authorities at Rio; they let the captain out of prison. I saw him afterward walking about in Rio. I left Rio in The Malek, under the command of Lieut. Ogden, and with the crew who are now in prison, where we have been since we arrived. Lieut. Ogden had on board, besides ourselves, four men and one midshipman. I kept the log-book of The Malek; Captain Nunez got it from me, to take it to the consul the day we went before him. It was laid before the consul, and I never saw it afterwards. The log-book contained some of the * particulars about the firing. (Here [* 219] a book is shown to the witness.) This book was kept by the captain. Lieut. Drayton kept a log-book from Bahia to Rio.

Cross-Examination.

Upon cross-examination, the witness further deposed: While I was on board The Yankee, a midshipman and four men came on board, and ordered me on board the schooner Enterprise. I was not imprisoned at Bahia. Peter Roberts (Martin) was among the men who went on the larboard side. I do not know whether the pistols Curry carried were loaded or not; one pistol out of the four was

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loaded, I know. The men who accompanied Curry were unarmed, to the best of my knowledge. The Albert answered the hail of The Malek Adhel. Our brig had her name on the stern. I saw Curry put the money down on the cabin table. I did not tell any one I had seen the money counted out. On my examination at Bahia, I stated that Curry had told me that he had received the money. I do not recollect whether I stated then that I saw it. The cook's deposition was not taken, that I know of. Silvie and the boy were in the cabin with Nunez and Curry. I am from Philadelphia, but have sailed out of New York for the last five years. Have sailed as mate twice before. Before the offer of \$500, made by Nunez to his crew to board The Albert, he had not ordered the crew, nor had they refused to go.

Further Cross-Examination of John Myers.

John Myers, upon his further cross-examination, deposed as follows:—

We left Captain Nunez at Bahia. When we first arrived at Rio, I did not see him. The second time I went ashore I saw him in jail. I do not know how long he remained in jail. We remained at Rio four months. I never saw Nunez after the frigate Potomac arrived. The Enterprise and The Malek Adhel went into Rio together. Nunez was at liberty on shore after The Enterprise arrived. I saw Nunez three or four days before we sailed from Rio; he told me he was going to take command again of The Malek Adhel. Martin went with the rest of the crew before the consul. I saw him in the consul's office. I never saw Martin at Rio; we left him at Bahia. I saw both Currie and Silvie at Rio, but do not know how they got there. A vessel bound direct from Bahia to Guayamas would not stop at Rio. I did not see either Currie or Silvie
[220] after The Potomac *arrived. I should think The Potomac was at Rio twelve or fifteen days before we sailed for home.

Z. Collins Lee and R. Johnson, for the United States.

Meredith, and Nelson, (attorney-general,) for the claimants.

[* 229] *STORY, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Maryland, sitting in admiralty, and affirming a decree of the district court rendered upon an information *in rem*, upon a seizure brought for a supposed violation of the act of the 3d of March, 1819, c. 77,¹ (c. 200,) to protect the commerce of the

¹ 8 Stats. at Large, 570.

United States, and to punish the crime of piracy. The information originally contained five counts, each asserting a piratical aggression and restraint on the high seas upon a different vessel; one, The Madras, belonging to British subjects; another, The Sullivan, belonging to American citizens; another, The Emily Wilder, belonging to American citizens; another, The Albert, belonging to British subjects; and another upon a vessel whose name was unknown, belonging to Portuguese subjects; and this last count contained also an allegation of a piratical depredation. The Malek Adhel and cargo were claimed by the firm of Peter Harmony and Co., of New York, as their property, and the answer denied the whole *gravamen* of the information. At the hearing in the district court, the vessel was condemned and the cargo acquitted, and the costs were directed to be a charge upon the property condemned. An appeal was taken by both parties to the circuit court; and upon leave obtained, two additional counts were there filed, one alleging a piratical aggression, restraint, and depredation upon a vessel belonging to Portuguese subjects, whose name was unknown, in a hostile manner and with intent to destroy *and plunder the vessel, in violation of [*230] the law of nations; and another alleging an aggression by discharge of cannon and restraint upon a British vessel called The Alert, or The Albert, in a hostile manner, and with intent to sink and destroy the same vessel, in violation of the law of nations. Upon the hearing of the cause in the circuit court, the decree of the district court was affirmed; and from that decree an appeal has been taken by both parties to this court.

It was fully admitted in the court below, that the owners of the brig and cargo never contemplated or authorized the acts complained of; that the brig was bound on an innocent commercial voyage from New York to Guayamas, in California; and that the equipments on board were the usual equipments for such a voyage. It appears from the evidence, that the brig sailed from the port of New York on the 30th of June, 1840, under the command of one Joseph Nunez, armed with a cannon and ammunition, and with pistols and daggers on board. The acts of aggression complained of were committed at different times under false pretences, and wantonly and wilfully without provocation or justification, between the 6th of July, 1840, and the 20th of August, 1840, when the brig arrived at Bahia; where, in consequence of the information given to the American consul by the crew, the brig was seized by the United States ship Enterprise, then at that port, and carried to Rio Janeiro, and from thence brought to the United States.

The general facts are fully stated in a deposition of one John

Myers, the first mate of The Malek Adhel; and his testimony is corroborated by the other evidence in the cause, in its main outlines and details. The narrative, although long, cannot be better given than in his own words. He says, among other things: "On Tuesday, the 30th of June," [here the judge read a part of the evidence of Myers, which is set forth in the statement of the case by the reporter.]

Now upon this posture of the case, it has been contended, 1. That the brig was not an armed vessel in the sense of the act of congress of 1819, c. 77, (c. 200.) 2. That the aggressions, restraints, and depredations disclosed in the evidence were not piratical within the sense of the act. 3. That if the case in both respects is brought within the scope of the act, still, neither the brig nor the cargo are liable to condemnation, because the owners neither participated in nor authorized the piratical acts, but are entirely innocent thereof. 4. That if the

brig is so liable to condemnation, the cargo is not, either [*231] under the act of congress or by the law of nations. * We

shall address ourselves accordingly to the consideration of each of these grounds of defence. The act of 1819, c. 77, (c. 200,) provides, in the 1st section, that the President is authorized and requested to employ the public armed ships of the United States, with suitable instructions, "in protecting the merchant ships of the United States and their crews from piratical aggressions and depredations." By the 2d section, the commanders of such armed vessels are authorized "to subdue, seize, take, and send into any port of the United States any armed vessel or boat, or any vessel or boat the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens of the United States, or upon any other vessel," &c. By the 3d section, it is provided: "That the commander and crew of any merchant vessel owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any other armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same," &c. Then comes the 4th section, (upon which the five counts of the original information are founded,) which is as follows: "That whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use and that of the captors, after due process and trial in any court

having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion." The 5th section declares, that any person who shall, on the high seas, commit the crime of piracy as defined by the law of nations, shall, upon conviction thereof, be punished with death.

Such are the provisions of the act of 1819, c. 77, (c. 200.) And it appears to us exceedingly clear, that The Malek Adhel is an "armed vessel" within the true intent and meaning of the act. No distinction is taken, or even suggested in the act, as to the objects, or purposes, or character of the armament, whether it be for offence or defence, legitimate or illegitimate. The policy, as well as the words * of the act equally extend to all armed vessels which [*232] commit the unlawful acts specified therein. And there is no ground, either of principle or authority, upon which we are at liberty to extract the present case from the operation of the act.

The next question is, whether the acts complained of are piratical within the sense and purview of the act. The argument for the claimants seems to suppose, that the act does not intend to punish any aggression, which, if carried into complete execution, would not amount to positive piracy in contemplation of law. That it must be mainly, if not exclusively, done *animo furandi* or *lucri causa*; and that it must unequivocally demonstrate that the aggression is with a view to plunder, and not for any other purpose, however hostile or atrocious or indispensable such purpose may be. We cannot adopt any such narrow and limited interpretation of the words of the act; and in our judgment it would manifestly defeat the objects and policy of the act, which seems designed to carry into effect the general law of nations on the same subject in a just and appropriate manner. Where the act uses the word "piratical," it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations without any regard to right or duty, or any pretence of public authority. If he wilfully sinks or destroys an innocent merchant-ship, without any other object than to gratify his law-

less appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of congress, as if he did it solely and exclusively for the sake of plunder, *lucris causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*. We think that the aggressions established by the evidence bring the case completely within the prohibitions of the act; and if an intent to plunder were necessary to be established, (as we think it is not,) the acts of aggression and hostility and plunder [*233] committed on the *Portuguese vessel are sufficient to establish the fact of an open although petty plunderage.

Besides, the argument interprets the act of congress as though it contained only the word "depredation," or at least coupled aggression and depredation as concurrent and essential circumstances to bring the case within the penal enactment of the law. But the act has no such limitations or qualifications. It punishes any piratical aggression, or piratical search, or piratical restraint, or piratical seizure, as well as a piratical depredation. Either is sufficient. The search or restraint may be piratical although no plunder follows, or is found worth carrying away. What Captain Nunez designed under his false and hollow pretences and excuses it may not be easy to say with exact confidence or certainty. It may have been to train his crew to acts of wanton and piratical mischief, or to seduce them into piratical enterprises. It may have been from a reckless and wanton abuse of power, to gratify his own lawless passions. It could scarcely have been from mental hallucinations, for there was too much method in his mad projects to leave any doubt that there was cunning and craft and worldly wisdom in his course, and that he meditated more than he chose to explain to his crew. They never suspected or accused him of insanity, although they did of purposes of fraud.

The next question is, Whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of congress? Here, again, it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the coöperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of congress) from which such piratical aggression, &c., shall have been first attempted or made, shall be condemned. Nor is there any thing new in a provision of this sort. It is not an uncommon course

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in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine, also, is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has *been applied to other kindred cases, such as cases [*234] arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of *The United States v. The Schooner Little Charles*, 1 Brock. 347, 354, a case arising under the embargo laws, the same argument which has been addressed to us, was, upon that occasion, addressed to Mr. Chief Justice Marshall. The learned judge, in reply, said: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report." The same doctrine was held by this court in the case of *The Palmyra*, 12 Wheat. 1, 14, where, referring to seizures in revenue causes, it was said: "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing; and this whether the offence be *malum prohibitum* or *malum in re*. The same thing applies to proceeding *in rem* or seizures in the admiralty." The same doctrine has been fully recognized in the high court of admiralty in England, as is sufficiently apparent from *The Vrow Judith*, 1 Rob. 150; *The Adonis*, 5 Rob. 256; *The Mars*, 6 Rob. 87; and indeed in many other cases where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not.¹

The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for exam-

¹ See 3 Wheaton's Reports, Appendix, pp. 37 to 40.

ple, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.

[* 235] * The act of congress has therefore done nothing more on this point than to affirm and enforce the general principles of the maritime law and of the law of nations.

The remaining question is, whether the cargo is involved in the same fate as the ship. In respect to the forfeiture under the act of 1819, it is plain that the cargo stands upon a very different ground from that of the ship. Nothing is said in relation to the condemnation of the cargo in the fourth section of the act; and in the silence of any expression of the legislature, in the case of provisions confessedly penal, it ought not to be presumed that their intention exceeded their language. We have no right to presume that the policy of the act reached beyond the condemnation of the offending vessel.

The argument, then, which seeks condemnation of the cargo, must rely solely and exclusively for its support upon the sixth and seventh counts, founded upon the law of nations and the general maritime law. So far as the general maritime law applies to torts or injuries committed on the high seas and within the admiralty jurisdiction, the general rule is, not forfeiture of the offending property; but compensation to the full extent of all damages sustained or reasonably allowable, to be enforced by a proceeding therefor *in rem* or *in personam*. It is true that the law of nations goes in many cases much further, and inflicts the penalty of confiscation for very gross and wanton violations of duty. But, then, it limits the penalty to cases of extraordinary turpitude or violence. For petty misconduct, or petty plunderage, or petty neglect of duty, it contents itself with the mitigated rule of compensation in damages. Such was the doctrine recognized by this court in the case of *The Marianna Flora*, 11 Wheat. 1, 40, where an attempt was made to inflict the penalty of confiscation for an asserted (but not proved) piratical or hostile aggression. Upon that occasion, the court said: "The other count," (which was similar to those now under our consideration,) "which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted that every offence, however small, however done under a mistake of rights, or for pur-

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conclusive cause of
upon this might
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poses wholly defensive, is to be visited
punishments. Whatever * may be the
fraudulent, and unprovoked attack is
upon another upon the sea, which is
injury, such effects are not to be attri-
buted to negligence. It may be just to
award the injured party full compensation for his actual
infliction of any forfeiture beyond this does not
follow by any considerations derived from public law."

afterwards added: "And a piratical aggression by an armed
vessel sailing under the regular flag of any nation, may be justly subjected
to the penalty of confiscation for such a gross breach of the law of
nations. But every hostile attack in a time of peace, is not neces-
sarily piratical. It may be by mistake or in necessary self-defence,
or to repel a supposed meditated attack by pirates. It may be justifi-
fiable, and then no blame attaches to the act; or it may be without
any just excuse, and then it carries responsibility in damages. If it
proceed further, if it be an attack from revenge or malignity, from a
gross abuse of power, and a settled purpose of mischief, then it
assumes the character of a private unauthorized war, and may be
punished by all the penalties which the law of nations can properly
administer;" that is, (as the context shows,) confiscation and for-
feiture of the offending vessel.

Now, it is impossible to read this language and not to feel that it
directly applies to the present case. In the first place, it shows that
the offending vessel may, by the law of nations, in the case sup-
posed, of an attack from malignity, from a gross abuse of power, and
a settled purpose of mischief, be justly subjected to forfeiture. But
it is as clear that the language is solely addressed to the offending
vessel, and was not intended as of course to embrace the cargo, even
if it belonged to the same owner, and he did not participate in or
authorize the offensive aggression. For the court afterwards, in an-
other part of the case, where the subject of the cargo was directly
under consideration said: "But the second count" (founded on the
law of nations) "embraces a wider range; and if it had been proved
in its aggravated extent, it does not necessarily follow that the cargo
ought to be exempted. That is a question which would require
grave deliberation. It is in general true that the act of the master
does not bind the innocent owner of the cargo; but the rule is not
of universal application. And where the master is also agent and
the owner of the cargo, or both ship and cargo belong to the same
person, a distinction may, perhaps, arise in the principle of
decision." So that the * court studiously avoided giving a [*237]

ple, in ~~case~~ opinion upon this point. Looking to the authorities or ~~elsewhere~~ subject, we shall find that the cargo is not generally the ~~general~~ to be involved in the same confiscation as the ship, unless ~~used~~ owner thereof coöperates in or authorizes the unlawful act. There are exceptions founded in the policy of nations, and as it were the necessities of enforcing belligerent rights against fraudulent evasions, where a more strict rule is enforced and the cargo follows the fate of the ship. But these exceptions stand upon peculiar grounds, and will be found, upon a close examination, to be consistent with, and distinguishable from, the general principle above suggested. Many of the authorities upon this subject have been cited at the bar, and others will be found copiously collected in a note in the appendix to the 2d vol. of Wheat. pp. 37-40.

The present case seems to us fairly to fall within the general principle of exempting the cargo. The owners are confessedly innocent of all intentional or meditated wrong. They are free from any imputation of guilt, and every suspicion of connivance with the master in his hostile acts and wanton misconduct. Unless, then, there were some stubborn rule, which, upon clear grounds of public policy, required the penalty of confiscation to extend to the cargo, we should be unwilling to enforce it. We know of no such rule. On the contrary, the act of congress, pointing out, as it does, in this very case, a limitation of the penalty of confiscation to the vessel alone, satisfies our minds that the public policy of our government, in cases of this nature, is not intended to embrace the cargo. It is satisfied by attaching the penalty to the offending vessel, as all that public justice and a just regard to private rights require. For these reasons, we are of opinion that the decrees condemning the vessel and restoring the cargo, rendered in both the courts below, ought to be affirmed.

There remains, then, only the consideration of the costs, whether the courts below did right in making them exclusively a charge upon the proceeds of the condemned property. Costs in the admiralty are in the sound discretion of the court; and no appellate court should ordinarily interfere with that discretion, unless under peculiar circumstances. Here, no such circumstances occur. The matter of costs is not *per se* the proper subject of an appeal; but it can be taken notice of only incidentally as connected with the principal decree, when the correctness of the latter is directly before the court. In the

present case the cargo was acquitted, and there is no ground [* 238] to *impute any fault to it. If it had been owned by a third person, there would have been no reason for mulcting the owner in costs, under circumstances like the present, where it was impracticable to separate the cargo from the vessel by any

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delivery thereof, unless in a foreign port, and no peculiar cause of suspicion attached thereto. Its belonging to the same owner might justify its being brought in and subjected to judicial examination and inquiry, as a case where there was probable cause for the seizure and detention. But there it stopped. The innocence of the owner has been fully established; the vessel has been subjected to condemnation, and the fund is amply sufficient to indemnify the captors for all their costs and charges. We see no reason why the innocent cargo, under such circumstances, should be loaded with any cumulative burdens.

Upon the whole, we are all of opinion that the decree of the circuit court ought to be, and it is affirmed, without costs.

18 H. 71, 110; 20 H. 296; 7 Wal. 152.

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• An appeal bond, approved by the court is sufficient, though signed by only part of the appellants.

A petition to open a final decree, filed and taken into consideration by the court at the same term in which the decree was made, suspends the decree, so that the ten days, allowed to supersede it by an appeal, do not begin to run till the petition is disposed of.

APPEAL from the circuit court for the District of Columbia.

The grounds of the motion appear in the opinion of the court.

Jones and Brent, for the motion.

• *Bradley and Neale*, contra.

• **STORY, J.**, delivered the opinion of the court. [• 240]

A motion has been made to dismiss this appeal upon several grounds. The first is, that although all the defendants have appealed from the decree of the court below, yet a part of them, only, have signed the appeal bond. This objection is not maintainable. It is not necessary that all the defendants should join in the appeal bond, although all must join in the appeal. It is sufficient if the appeal bond is approved by the court, as satisfactory and complete security, by whomsoever it may be executed.

The next ground is, that an appeal has been taken from the refusal of the court below to open the former decree, rendered for the appellant. It is plain that no appeal lies to this court in such a matter, as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first de-

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cree (which was a final decree) rendered by the court. That [* 241] decree * was rendered on the 10th of May, 1843. During the same term, a petition was filed by the defendants on the 26th day of the same month, to have the final decree opened for certain purposes; and the court took cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a *supersedeas*, or to stay execution on the decree; because to have such an effect, the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June, and that the appeal was duly taken, and the appeal bond given within ten days from this last period.

Another and the last ground of exception is to the want of proper parties to the writ of error and citation. No writ of error lies in this case, but an appeal only; and the appeal having been made in open court, no citation was necessary.

Upon the whole, we are of opinion that the motion to dismiss the appeal ought to be overruled, and it is accordingly overruled.

14 H. 1; 18 H. 507; 7 Wal. 575.

WILLIAM A. DROMGOOLE, FREDERICK G. TURNBULL, and CHARLES A. LACOSTE, Plaintiffs in Error, v. THE FARMERS AND MERCHANTS' BANK OF MISSISSIPPI.

2 H. 241.

The statute of Mississippi, requiring payees and indorsees to be joined in a suit by the holder of a promissory note, will not enable an indorsee to sue the maker and indorser in a circuit court of the United States, if the maker and payee were citizens of the same State.

. THE case is stated in the opinion of the court.

Walker, for the plaintiffs.

No counsel *contra*.

• STORY, J., delivered the opinion of the court. [* 242]

This is a writ of error to the circuit court of the United States for the southern district of Mississippi.

• The original action was brought by the Bank of Mem- [* 243]phis, alleging the stockholders to be citizens of Tennessee, against the plaintiffs in error, (the original defendants,) alleging them to be citizens of Mississippi; and it was founded upon a promissory note made by Dromgoole and Turnbull, (two of the defendants,) dated at Princeton, Washington county, Mississippi, May 17, 1838, whereby on the 1st of January, 1839, they or either of them promised to pay to the order of Briggs, Lácoste, and Co., \$2,899.50, for value received, payable and negotiable at the Planters' Bank of Mississippi, at Natchez. The declaration alleged title in the bank to the note by the indorsement of the payees, Lácoste using the name and description of Briggs, Lácoste, and Co. to them; and the suit was brought jointly against both the maker and the payee, in conformity to a statute of Mississippi, authorizing such a proceeding. The defendants pleaded that they are citizens of Mississippi, and that the persons composing the firm of Briggs, Lácoste, and Co., were and yet are citizens and residents of Mississippi, and were so at the time of the supposed transfer and delivery of the promissory note to the bank. To this plea there was a demurrer and joinder, on which the circuit court gave judgment for the bank; and the present writ of error is brought to revise that judgment.

The 11th section of the Judiciary Act of 1789,¹ c. 20, provides: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or alter those in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Now the present case falls directly within the prohibition of this clause. The suit is brought by the plaintiffs to recover the contents of a promissory note of which they are the indorsees of the payee, and the payee and the makers are all citizens of Mississippi. The ground on which the original judgment was given, probably, was that the statute of Mississippi required all the parties to the note to be joined in the suit; and as all the plaintiffs were citizens of Tennessee, and all the defendants citizens of Mississippi, it was a case falling directly within the general provisions of the 11th section of the Judiciary Act of 1789, c. 20, which gives jurisdiction to the circuit court in cases where "the suit is between a citizen of the

¹ 1 Stats. at Large, 78.

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State where the suit is brought, and a citizen of another State.”

But it has been already decided by this court, that the statute [* 244] of Mississippi is of no force or effect in the * courts of the

United States, and that independently of that statute no such joint action is by law maintainable. This was decided in *Keary v. The Farmers and Merchants' Bank of Memphis*, 16 Pet. 89. The other point, that the case falls within the prohibition of the 11th section of the Judiciary Act of 1789, c. 20, was as fully recognized by this court in *Gibson and Martin v. Chew*, 16 Pet. 315.

There is nothing then in the present case which is open for argument. The judgment of the circuit court of the southern district of Mississippi is therefore reversed, and the cause remanded to that court, with directions to enter a judgment for the defendants.

6 H. 31; 18 H. 517.

THOMAS GRIFFIN and HUGH ERVIN v. ROBERT THOMPSON.

2 H. 244.

The marshal cannot receive depreciated currency in satisfaction of an execution; and if he returns that he has done so, the return may be quashed on motion, and an alias execution issued upon the judgment.

CERTIFICATE of division of opinion by the judges of the circuit court of the United States for the southern district of Missouri.

The marshal, by his deputy, had returned on an execution that he had received in satisfaction thereof certain bank-notes, which were, in point of fact, not of their nominal value in gold and silver. Upon motion of the judgment creditors, this return was quashed and an alias execution ordered and issued. The judgment debtor moved to have satisfaction entered on the alias execution, and also that the same should be quashed. Upon the allowance of these motions, the judges divided in opinion.

Henderson, for the judgment debtor.

Harrison and Holt, contra.

[* 256] * DANIEL, J., delivered the opinion of the court.

This court is unable to perceive upon what principle of law either of the objects sought by the motion of the plaintiffs in the circuit court could have been accorded to them. It cannot be questioned that the defendant in that motion was entitled to the full benefit and operation of his execution, and these were to cause to be made for him of the goods and chattels, lands and tenements, of his debtor, the sum of \$1,740.02, of lawful money of the United States.

With his claim, thus solemnly ascertained of record, we are aware of no authority, from any source, which can compel him to commute it, or to receive in satisfaction thereof any other thing which he shall not voluntarily elect. But least of all should such an authority be recognized in a quarter more fruitful than any other of abuses in its exercise; for instance, from the will either of the debtor, or the officer whose position would enable him, in some degree, to practise on both creditor and debtor. To permit either the debtor or the officer to impose upon the creditor the receipt of depreciated paper in payment, would be to permit not merely a repeal of the judgment, but a violation, a virtual abrogation indeed, of the contract on which it was founded; for none can fail to perceive the thousand fraudulent devices for profit or favor which the toleration of such a practice would naturally call into action to defeat the rights of creditors. The courts of justice might thus be made to subserve only the purposes of dishonesty, and be transformed into engines of monstrous wrong. It has been argued in support of this motion, that bank-notes constitute good and lawful payment if received; that as the law recognizes their circulation, debtors may lawfully tender them in payment, and creditors may lawfully receive them, though not legally bound to do so. From these postulates it is then attempted to draw the following conclusions. 1. That the marshal is the plaintiff's agent, who, by the execution, may receive the plaintiff's debt. 2. That he who may lawfully receive payment, may have a lawful tender of payment made to him. 3. That if a tender or payment of bank-notes to the principal, not by him objected to, is a good tender or payment, the like tender or payment to the agent is equally good. This argument, to say the least of it, is wholly untenable. 'Tis undoubtably true, that the creditor may receive either bank-notes or blank paper in satisfaction of his debt, for the reason that his power over that debt is supreme, and he may release it without payment of any kind, if he think proper. But the fallacy of the argument * here [* 257] consists in totally misconceiving the situation and functions of the marshal. He is properly the officer of the law rather than the agent of the parties, and is bound to fulfil the behests of the law; and this too without special instruction or admonition from any person. If then, when commanded to levy a sum of money, he make a return that he has not done this, but has, of his own mere will, substituted for money depreciated bank-notes, his return is an admission, on oath, that he has both disobeyed his orders and transcended his powers, for legally he has no powers save those he derives from the precept he is ordered to obey. Can it be doubted that upon application from those whose interests are involved in the performance of

his duties by the marshal, it is the right and the duty of the court in such a case to correct the irregularities of its officer, and to compel him to perform his duty? There is inherent in every court, a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power, courts would be wholly impotent and useless. The returns of the marshal in this case, upon the final process in his hands, showing the receipt by him of depreciated bank-paper in satisfaction of that process which ordered him to collect money, are held to be departures from the performance of his duty as plainly enjoined by the process itself, are deemed therefore illegal and void, and ought, upon the application of the party injured thereby, to have been set aside and annulled by the court. In conformity with the principles herein sanctioned, we therefore order it to be certified to the judges of the circuit court for the southern district of Mississippi, that satisfaction should not be entered on the execution of *feri facias* which was sued out in this case on the 4th of June, 1840, in favor of the said Robert Thompson v. the said Thomas Griffin and Hugh Ervin, for the sum of \$1,740.02, with interest and costs; and further, that the execution of *fi. fa.*, which was sued out against the said Thomas Griffin and Hugh Ervin on the sixth day of November, 1841, should not be quashed; and that the motion of the plaintiff in the circuit court should be overruled.

2 H. 258; 3 H. 707.

BUCKHANNAN, HAGAN, AND Co., for the Use of GEORGE BUCKHANNAN, Plaintiffs, v. WILLIAM TINNIN, RALPH CAMPBELL, and JOHN G. ANDREWS, Defendants.

2 H. 258.

If the creditor assents to the receipt by the marshal of depreciated bank-notes in satisfaction of an execution, he is bound thereby, and his assent may be presumed from lapse of time and other circumstances.

THIS case was like the next preceding in all its circumstances, save the differences pointed out in the opinion of the court.

Duncan and *Holt*, for the creditors.

No counsel *contra*.

[*261] * DANIEL, J., delivered the opinion of the court.

The principles ruled in the case of *Griffin v. Thompson*, 2 How. 244, as those which define the duties and should govern the conduct of the marshal in levying executions committed to his hands,

have been here again considered and approved. They would be decisive also of the case now under consideration, but for two points of difference between this and the case of *Griffin v. Thompson*. These two points arise, 1st, upon the time intervening between the return of the marshal and the plaintiff's motion, as tending to show an acquiescence by the plaintiff; and, secondly, upon the [*262] additional evidence in this case amounting to proof of approbation or sanction by the plaintiff, express or implied of the conduct of the marshal. In *Griffin v. Thompson*, application was made to the court at the earliest practicable period to set aside the marshal's return, and there was throughout no fact or circumstance tending to show a recognition, by the party, or a moment's acquiescence by him, in the irregularity complained of. In the present case, the return of the marshal showing the receipt by him of the depreciated bank-notes, bears date on the 17th February, 1840; the motion to quash was made in May, 1842. Thus an interval of more than two years was permitted to elapse between the return and the motion; a period during which the party must be presumed to have been cognizant of the return, a public and official proceeding to be found amongst the files and records of the court to which access might at all times have been had. If this fact stood alone, unassociated with, and unexplained by any other, it would of itself imply at least, on the part of the plaintiff, laches and negligence in the prosecution of his interests, if not an assent by him to the acts of the officer. This fact of time, however, is by no means solitary or isolated in the evidence in this cause. The language of the return certainly imports no objection by the plaintiff or by any other to the receipt of the \$1,300, or to the medium in which they were collected; so far from this, when taken altogether, that language strongly implies, if it does not directly declare, that the plaintiff, or whosoever he was that took control of the matter, approved of the proceeding so far as it had gone, and objected only to a collection of the residue of the execution at that time. It should not be lost sight of either, in construing this language, that no exception to any one kind of medium, or preference for any other, is indicated in the inhibition as stated; it is a simple direction to proceed no further. It cannot be objected to the return in question, that it is the act or declaration of the officer whose conduct in making it is impeached. Although the act of that officer, it is a sworn return, and must stand until falsified. It is introduced by the plaintiff himself in support of his motion; is indeed the only evidence he has adduced to sustain it; he relies on this return, and in so doing, must take it entire; he cannot be permitted to garble it. The return must be received as stating the truth. It must be received in all its parts;

Matheson's Administrators v. Grant's Administrator. 2 H.

and if so, it comes (especially when viewed in connection with the interval between the dates of that return and of the motion [*263] in this * case,) on the part of the plaintiff, an acquiescence, if not a direct sanction, which at this day, this court is unwilling to disturb. Great wrong might, by so late an interference, be visited upon the officer, who may have been reposing upon the conduct of this plaintiff; and the danger of a result like this is enhanced by the total absence of any thing like proof to show that the plaintiff ever refused to receive the amount collected by the marshal, and may not have actually received and applied it to his own use, or at what rate of value if so received. This court is of the opinion upon the case certified to them, that the return of the marshal of the 17th of February, 1840, should not, under the facts disclosed in this case, be quashed.

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JOHN MURPHY and JOHN DARRINGTON, Administrators of WILLIAM MATHESON, deceased, Plaintiffs in Error, v. ANGUS STEWART, Administrator of ALEXANDER GRANT.

2 H. 263.

At the term when a verdict was rendered, a motion was made in arrest of judgment, for a misjoinder of counts, and the judgment was ordered to be arrested, but no formal judgment, that the plaintiff take nothing by his writ *non obstante veredicto*, was entered. At the second term following, the court, on motion, set aside the order arresting the judgment, allowed a *nolle prosequi* to be entered on one count to cure the misjoinder, and ordered the verdict to be entered on the other count, to which it appeared the evidence was applicable, and entered a judgment *nunc pro tunc* for the plaintiff.

Held, 1. That this amendment of the verdict and of the record was within the power of the court under the statute of jeofails, (the 32d section of the Judiciary Act of 1789, 1 Stats. at Large, 91,) and being an exercise of the discretion of the court below, it could not be revised by a writ of error.

There is no fixed time within which verdicts and judgments may be amended; even after error brought, if within a reasonable time, such amendments may be allowed, and it is a salutary practice thus to cure merely formal defects.

Whether in Alabama a *profert* of letters of administration is necessary, *quære*; but if so, the want of it is cured by a verdict.

A note, payable to G. and G., *primâ facie* imports that there is a partnership.

An administrator, who is indorsee of a note, may elect to sue thereon as administrator, or in his own right.

THE case is stated in the opinion of the court.

Ogden, for the plaintiffs.

Nelson, (attorney-general,) *contra*.

[* 279] * STORY, J., delivered the opinion of the court.

This is the case of a writ of error to the circuit court of the United States for the southern district of Alabama.

The original action was *assumpsit* brought by Stewart (the defend-

ant in error) as administrator of Alexander Grant, who was the surviving partner of the firm of Grant and M'Guffie, against Murphy and Darrington as administrators of Matheson, upon a certain note and due-bill made and signed by Matheson in his lifetime. The note was as follows: "Charleston, 30th Sept., 1818. Four months after date I promise to pay Grant and M'Guffie, or order, \$3,428.18, value received." The due-bill was as follows: "Charleston, 25th February, 1820. Due to Grant and M'Guffie, or bearer, on demand, \$344.66, with interest from date." The note was indorsed in blank, "Grant and M'Guffie."

The declaration contained two counts. The first count is by Stewart as administrator upon both instruments, and upon promises made by Matheson in his lifetime, and by his administrators since his decease, to pay him (Stewart) as administrator. The second is upon both instruments, stating the note to have been indorsed by Grant and M'Guffie to him, (Stewart,) and the due-bill to have been *transferred to him by delivery. So that in legal [*280] effect he claimed in the first count as administrator, and in the second in his own personal right. At the trial (for it is unnecessary to state the pleadings) the jury found a general verdict for the plaintiff, upon both counts, at the November term of the court, 1840. And at the same term a motion was made in arrest of judgment for the misjoinder of the counts, which motion was sustained, and thereupon it was ordered by the court that the judgment be arrested. At the November term of the court, 1841, a motion was made to set aside the order in arrest of judgment, and for leave to amend the verdict so that the same might be entered upon the first count, and a *nolle prosequi* entered upon the other count. In support of this motion, an affidavit was made by the plaintiff's counsel, that the only evidence offered at the trial by the plaintiff was the deposition of Chapman Levy, Jacob Axon, and — M'Kenzie, and the note and due-bill which were on the files of the court; and that no evidence was offered by the defendants; and that the cause went to the jury upon the above depositions of the plaintiff alone. Upon this evidence after notice to and hearing the counsel for the defendants, who offered no evidence in opposition to the motion, the court made an order, vacating the order in arrest of judgment, and allowing the verdict to be amended by entering the same on the first count, and that judgment be entered upon that count *nunc pro tunc* for the plaintiff. Judgment was accordingly entered thereon; and from that judgment the present writ of error has been brought.

The main question which has been argued is, whether the court had authority to make the amendment at the time and under the

circumstances stated in the record. It is observable that there was no judgment in the present case originally entered, that the plaintiff takes nothing by his writ, *non obstante veredicto*; but a simple order passed arresting the judgment, which suspended all further proceedings until the court should put them again in motion, but still left the cause pending in the court. It is a case, therefore, in a far more favorable position for the exercise of the power of amendment, than it would have been if final judgment had passed against the plaintiff, or if judgment had passed for the plaintiff, and a writ of error had been brought to reverse it; for in the latter case not only is the writ of error deemed in law a new action;¹ but in contemplation of law the record itself is supposed to be removed from the court below.

[* 281] * And first, as to the time of making the amendment. It is said that it should have been either at the term when the order for the arrest of judgment was made, or at the furthest, at the next succeeding May term of the court; and it was too late to make it a whole year afterwards. But there is no time absolutely fixed, within which such an amendment should be moved. All that the court requires is that it should be done within a reasonable time; and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions to amend the record after a writ of error has been brought; nay, after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session. Especially in cases of misjoinder of counts, which are incompatible with each other, as well as in cases where there are several counts, some of which are bad and some good, and a general verdict given for the plaintiff, such applications, when made within a reasonable time, are usually granted after error brought, and the verdict allowed to be amended so as to be entered upon the good counts, or upon the counts not incompatible with each other. This is most usually done upon the judge's notes of the evidence at the trial, establishing upon what counts the evidence was in fact given, or to which it was properly addressed or limited. But it may be done upon any other evidence equally clear and satisfactory, which may be submitted to the consideration of the court. In the present case we know from the most authentic sources contained in the record itself, and not disputed by any one, the whole evidence which was given at the trial. The case, therefore, falls directly within the range of the principles above stated. The practice is a most salutary one, and is in furtherance of justice, and to prevent the manifest

¹ 2 Tidd's Practice, 1141; 9th edition, 1828.

mischiefs from mere slips of counsel at the trial, having nothing to do with the real merits of the case. The authority to allow such amendments is very broadly given to the courts of the United States by the 32d section of the Judiciary Act of 1789, c. 20, and quite as broadly, to say the least, as it is possessed by any other courts in England or America ; and it is upheld upon principles of the soundest protective public policy.

Without citing the authorities at large, which are very numerous upon this point, it will be sufficient to state a few only, which are the most full and direct to the purpose. In *Eddowes v. Hopkins*, 1 Doug. 376, there was a general verdict on a declaration consisting * of different counts, some of which were incon- [* 282] sistent in point of law, it was held that as evidence had only been given upon the consistent counts, the verdict might be amended by the judge's notes at the trial. The same point was decided in *Harris v. Davis*, 1 Chitty, 625, note. In *Williams's Exec. v. Breedon*, 1 Bos. & Pull. 329, where a general verdict was given on two counts, one of which was bad, and it appeared by the judge's notes that the jury calculated the damages in evidence applicable to the good count only, the court allowed the verdict to be amended and entered on the good count only, though evidence was given applicable to the bad count also. In *Doe v. Perkins*, 3 Term R. 749, the court allowed the verdict to be amended after error brought, and joinder in error, by striking out certain words from the *postea*. An objection was on that occasion taken that the amendment could not be made after the expiration of one term after the trial. But the court said that there was no foundation for this objection ; for that according to the practice of amending by the judge's notes, which was of infinite utility to suitors, and was as ancient as the time of Charles I., the amendment might be made at any time. In *Henley v. The Mayor, &c. of Lyme Regis*, *6 Bing. 100, a verdict had been taken by consent on two counts, and upon application the court amended the *postea*, by entering it in one count to which the evidence applied, there being in fact but one cause of action, although the judge who presided at the trial, declined to interfere. In *Richardson v. Mellish*, 3 Bing. 334, S. C. in error, 7 Barn. & Cress. 819, where a general verdict was given on a declaration, some of the counts of which were bad, the court allowed the *postea* to be amended, and entered up judgment upon a single count after argument in error ; and the court in error sanctioned the proceeding. In *Harrison v. King*, 1 Barn. & Ald. 161, there was a general verdict for the plaintiff, and an application was made to the court to amend the verdict on the judge's notes after the lapse of eight years, and after the judgment had been reversed

upon error; but the court refused it upon the ground of the long delay. In *Clarke v. Lamb*, 8 Pick. 415, the supreme court of Massachusetts, after a general review of the authorities, allowed the verdict to be amended upon the judge's notes.¹

We think then that the objection taken at the bar to the amendment and entry of the judgment is not maintainable, and [*283] that the * court acted within its rightful authority and jurisdiction in the allowance thereof.

Another objection, rather suggested than insisted on, is, that there is no *profert* of the letters of administration. Whether that would constitute any objection whatsoever, in the State of Alabama, is a matter purely of local practice and proceedings. It is well known that in many States of the Union no *profert* of such letters is ever made, as, for example, in Massachusetts, and other New England States. But the objection, if it has any foundation, is undoubtedly cured by the verdict.

Another objection is, that the first count does not sufficiently allege a partnership between Grant and M'Guffie, nor that Grant was the survivor of them. We think otherwise. The first count in the amended record brought up on the *certiorari* is by Stewart, as administrator of Grant, and it states in the introductory part that he was the survivor of M'Guffie, late merchants, trading under the firm of Grant and M'Guffie; and alleges promises by Matheson to them in their lifetime, and by Matheson in his lifetime, and by his administrators to the plaintiff to pay the sums of money stated in the count, and alleges, as a breach, the non-payment thereof, either to Grant and M'Guffie in their lifetime, or to the plaintiff since their decease. The count certainly is not drawn with entire technical precision and accuracy; but, after verdict, it must be taken to be sufficient for all the purposes of substantial justice.

But then it is said, that if the first count is good, still, the evidence offered at the trial was not sufficient to establish any partnership between Grant and M'Guffie; and if the evidence did establish any case, it was a case within the scope of the second count, and not of the first. We think neither branch of the objection is maintainable. There was certainly evidence enough to go to the jury on this point, and the very instrument on which the suit was brought, *primâ facie*, imported a partnership, at least in these transactions; and the jury, by their verdict, must be presumed to have found the fact in the affirmative. In the next place, although the note was indorsed in blank by Grant and M'Guffie, that indorsement was no proof that the interest on the same had passed to Stewart, as alleged in the second count, and the possession of the due-bill, by Stewart, was no

¹ See also 2 Tidd's Practice, 901, 9th edition, 1828.

necessary proof that he held it as owner in his own right. For aught that appears, he may have held them both solely in his capacity as administrator; and he had a right, and the sole right to say in which *capacity he elected to hold, as owner, or as ad- [*284] ministrator. He has elected the latter; and the evidence is sufficient to establish that right, *primâ facie*. Besides, it can be of no concern to the plaintiff in error on which count the verdict is taken, for in either case it is equally a good foundation for a valid judgment against him, to the extent of the sums due thereon.

There is yet another view of this matter. The question of the amendment was a question of discretion in the court below upon its own review of the facts in evidence; and we know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seem to us to have belonged appropriately and exclusively to that court.

Upon the whole, in our opinion, there is no error of the court below in the amendment and proceedings complained of, and the judgment is therefore affirmed with costs.

Order. This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs and damages at the rate of six per cent. per annum.

6 H. 81, 280; 24 H. 888.

SIMEON STODDARD, CURTIS STODDARD, DANIEL STODDARD, ANTHONY STODDARD, WILLIAM STODDARD, JOSEPH. BUNNELL, and LUCY his Wife, JONAS FOSTER, and LAVINIA his Wife, LUCY HOXIE, DANIEL MORGAN, and AVA his Wife, Plaintiffs in Error, v. HARRY W CHAMBERS.

2 H. 284.

An act of congress confirming titles, excepted cases where the land had previously been located by any other person than the confirmer, under any law of the United States, or had been surveyed and sold by the United States. *Held*,—that a location, made on land reserved from sale by an act of congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmer was made perfect by the act of confirmation, and without any patent, as against the prior patent, which was simply void; and this valid legal title enured at once to the benefit of an assignee of the confirmer.

THE case is stated in the opinion of the court.

Lawless and Ewing, for the plaintiffs.

Jones, contra.

[*313] * M'LEAN, J., delivered the opinion of the court.

This case is from the circuit court of Missouri, and was brought here by a writ of error.

The plaintiffs brought an action of ejectment for 350 arpens of land, situated near St. Louis. Their title was founded on a concession by Delassus, lieutenant-governor, to Mordecai Bell, the 29th of January, 1800. Bell conveyed the same to James Mackay, the 29th of May, 1804, and on the 26th of September, 1805, he conveyed to Amos Stoddard. A plat and certificate of the survey were certified and recorded by Antoine Soulard, as surveyor-general, the 29th of January, 1806.

The above papers were presented to the recorder of the district of St. Louis, the 29th of June, 1808. And the claim was duly filed with the board of commissioners for their action thereon, who, on the 10th of October, 1811, rejected it. But afterwards on the 8th of June, 1835, the board decided that 350 arpens of land ought to be confirmed to the said Mordecai Bell, or his legal representatives, according to the survey. And on the 4th of July, 1836, an act of congress was passed, confirming the decision of the commissioners. The land was surveyed as confirmed. The plaintiffs proved the death of Amos Stoddard, before the suit was commenced, and that they are his heirs-at-law. The defendant was proved to be in possession of 48 acres and 84 hundredths of the land in controversy, 1 acre and 63 hundredths of which were in the [*314] *location and survey of Martin Coontz, and the residue within the patent of Peltier.

The title of the defendant was founded on an entry made by Peltier of 160 acres of land, by virtue of a New Madrid certificate, on the 24th of October, 1816. A survey of the entry was made in March, 1818, and a patent to Peltier was issued the 16th of July, 1832. Possession has been held under this title since 1819. The title was conveyed to the defendant.

On the 29th of May, 1818, an entry was made, which authorized the survey of Coontz, but no patent has been issued on it.

The township in which the above tract is situated, was surveyed in 1817, 1818, and 1819, and was examined in 1822. Since 1804, a certain mound on the land has been called Stoddard's Mound. In 1823, the proclamation of the President, published at St. Louis, directed the lands in the above township to be offered at public sale.

On the above evidence the court instructed the jury,

1. That the plaintiffs were not entitled to recover the land embraced in Peltier's patent.

2. That they were not entitled to recover the land embraced in Coontz's survey.

The decision of this controversy mainly depends on the construction of certain acts of congress. By the act of the 2d of March, 1805,¹ all persons residing in the territory of Orleans, who had claims to land under the French or Spanish government, were required to file their claims for record with the register of the land-office, or recorder of land titles, and provision was made for confirming them.

The time limited in the above act was extended by the act of the 3d of March, 1807,² as regards the filing of claims with the register or recorder, until the 1st of July, 1808. By the act of the 15th of February, 1811,³ the President was authorized to have the lands, which had been surveyed in Louisiana, offered for sale; "provided, however, that till after the decision of congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming land in the territory of Louisiana." The same reservation was repeated in the act of the 3d of March, 1811.⁴

The act of the 26th of May, 1824,⁵ authorized claimants "under French or Spanish grants, concessions, warrants, or orders of * surveys" in Missouri, issued before the 10th of March, [* 315] 1804, to file their petition in the district court of the United States, for the confirmation of their claims. And every claimant was declared by the same act to be barred, who did not file his petition in two years." By the act of the 24th of May, 1828,⁶ the time for filing petitions was extended to the 26th of May, 1829. On the 9th of July, 1832, an act was passed, "for the final adjustment of land titles in Missouri,"⁷ which provided that the recorder of land titles, with two commissioners to be appointed, should examine all the unconfirmed claims to land in Missouri, which had heretofore been filed in the office of the said recorder, according to law, prior to the 10th of March, 1804. And they were required to class the claims so as to "state in the first class what claims, in their opinion, would in fact have been confirmed, according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under them. And, secondly, what claims in their opinion are destitute of merit, law, or equity." And by the third section it was provided, "that from and after the final report of the recorder and commissioners, the lands contained in the second class shall be subject to sale as other public lands; and the lands contained in the

¹ 2 Stats. at Large, 324. ² Ib. 440. ³ Ib. 617. ⁴ Ib. 662. ⁵ 4 Ib. 52. ⁶ Ib. 298. ⁷ Ib. 565.

first class shall continue to be reserved from sale as heretofore, until the decision of congress shall be against the claims of any of them ; and the lands so decided against, shall be in like manner subject to sale as other public lands."

These are the facts and statutory provisions which are material in the case. The defendant, under the entry and survey of Peltier, holds the elder legal title to the land in controversy, except the one acre and sixty-three hundredths, which is covered by the entry and survey of Coontz. Until the confirmation of the plaintiff's title by the act of 1836,¹ the legal title to the land claimed was not vested in the plaintiffs.

Objections are made to the intermediate conveyances under which the plaintiffs claim. And first, it is insisted, that the deed from Bell to Mackay, was not proved. It is stated on the record, that there was no proof that R. Caulk, the syndic, before whom the deed was signed and acknowledged, had authority to act as such.

The deed was executed in 1804. It was attested by two witnesses, and purports to have been acknowledged in the presence of a syndic. There was no exception to the admission of this deed in evidence ; and, consequently, the objections now made to [*316] its * execution are not before the court. But if the execution of the instrument were now open to objections, they could not be sustained. Forty years have elapsed since this deed purports to have been executed. From that time to this, a claim under it seems to have been asserted. It was presented to the commissioners in 1811, having been filed with the recorder of land titles, in 1808. And again, it was brought before the commissioners in 1835, it having remained on the file until that time. Under these circumstances, the regular proof of the instrument might well be dispensed with. Possession, under this deed, was held by Stoddard for a time, and became so notorious that a certain elevation on the land was called Stoddard's Mound.

Independently of the lapse of time, the unsettled state of the country at the time this instrument was signed, the transfers of the country from one sovereignty to another, the rude and defective organization of the government—the civil and military functions being blended, are facts which no court can disregard in acting upon transfers of property between individuals. If some degree of regularity and form were observed in regard to public grants, technical and legal forms cannot be required in the transmission of claims to land, among a people, the great mass of whom were ignorant of the forms of titles, and indeed, of almost every thing which pertained to civil government.

¹ 5 Stats. at Large, 126.

A syndic was not, in that country, an appointed officer, as he is in a regulated government; but the duties devolved upon the commandants of military posts, as occasion might require. There is nothing on the face of this deed to excite suspicion. It was attested by two witnesses, and contains the signature and certificate of the syndic. The genuineness of these attestations was not objected to on the admission of the deed as evidence, or on a motion to overrule it. The deed must, therefore, be considered as evidence to the jury, without exception. And, under all the circumstances, we think, that full effect should have been given to it, as a muniment of title. The deed from Mackay to Stoddard, the ancestor of the plaintiffs, is not objected to. Bell made the conveyance to Mackay, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and enured, by way of estoppel, to his grantee, and those who claim by deed under him. A confirmation, by act of congress, vests in the confirmer the right of the United States, and a patent, if issued, could only be evidence of this. On a title by estoppel, an action of [*317] ejectment may be maintained.

If the claim of the defendant had not been interposed, no one could doubt the validity of the plaintiffs' title. It has the highest sanction of the government, an act of legislation. But the 2d section of the act of 1836, which gave this sanction, provided, "that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title to such lands, in opposition to the rights acquired by such location or purchase."

This provision, it is insisted, covers the case, and defeats the title of the plaintiffs. But it must be observed that a location, to come within the section, must have been made "under a law of the United States." Now an act under a law means in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs.

The holder of a New Madrid certificate had a right to locate. it only on "public lands which had been authorized to be sold." Peltier's location was made in 1816, and his survey in 1818. The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be no question that all lands, claimed under a French or Spanish title, which claim had been filed with the recorder of land titles, as the plaintiffs' claim had been, were reserved from sale

by the acts of congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the act of the 9th of July, 1832, and was continued until the final confirmation of the plaintiffs' title, by the act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears that when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiffs' survey, was not "a part of the public land authorized to be sold."

On the above facts, the important question arises, whether the defendant's title is not void. That this is a question as well examinable at law as in chancery, will not be controverted. That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is, whether the defendant has any title, as against the plaintiffs. And there seems to be no difficulty in answering the question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate.

No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. It has been argued that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual. The fee having been vested in the patentee by the first patent, the record could convey no right. It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol, but if it has been fraudulently obtained, or issued against law, it is void. It would be a most dangerous principle to hold, that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiffs' title. For the foregoing reasons, we think the instructions

of the court to the jury were erroneous ; and, consequently, the judgment must be reversed at the defendant's cost, and a *venire de novo* is awarded.

3 H. 82; 8 H. 298, 817, 845; 10 H. 848; 15 H. 525; 19 H. 823, 884; 21 H. 294, 426;
8 Wal. 420.

LESSEE OF ROBERT GRIGNON, PETER B. GRIGNON, and MORGAN L. MARTIN, Plaintiffs in Error, v. JOHN J. ASTOR, RAMSAY CROOKS, ROBERT STUART, and LINNS THOMPSON.

2 H. 319.

What is jurisdiction, defined.

What are inferior courts, of limited and special jurisdiction.

Where a county court had jurisdiction to order a sale of a decedent's estate, on the representation and finding of certain facts, and the record showed that a petition was presented and the order made. *Held*, that the granting of the license was a binding adjudication that all facts necessary to give jurisdiction, as well as to warrant the license, existed, and that the record was conclusive evidence thereof.

An act of congress, confirming a title, makes a legal title without a patent.

THE case is stated in the opinion of the court. The parts of the law of Michigan referred to, are as follows : —

[• 320] *Act July 27, 1818, sect. 1.* “ Be it enacted, &c., that, when the goods and chattels belonging to the estate of any person deceased, or that may hereafter decease, shall not be sufficient to answer the just debts which the deceased owned, &c., upon representation thereof, and the same being made to appear to the supreme judicial court, at any term of sitting of said court, or to the county court in the county where the deceased person last dwelt, or in the county in which the real estate lies, the said courts are severally and respectively authorized to empower and license the executors or administrators of such estate to make sale of all or any part of the houses, lands, or tenements of the deceased, so far as shall be necessary to satisfy the just debts which the deceased owed at the time of his death, and legacies bequeathed in and by the last will and testament of the deceased, with the incidental charges.

“ And every executor or administrator, being so licensed and authorized, shall and may, by virtue of such authority, make, sign, and execute, in due form of law, deeds and conveyances for such houses, &c., as they shall so sell ; which instrument shall make as good a title to the purchaser, his heirs and assigns forever, as the testator or intestate, being of full age, of sane mind and memory, in his or her lifetime, might or could for a valuable consideration.

“ Provided always, that the executor or administrator, before sale be made as aforesaid, give thirty days' public notice, by posting up

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notifications of such sale in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town of the county, &c.

“ Sect. 2. Whereas, by the partial sale of real estates for the payment of debts or legacies as aforesaid, it often happens that the remainder thereof is much injured : Be it therefore enacted, &c., that whenever it shall be necessary that executors and administrators [* 321] shall be empowered to sell some part of the real estate of testators or intestates, or for guardians to sell some part of the real estate of minors or persons *non compos mentis*, for the payment of just debts, legacies, or taxes, or for the support or legal expenses of minors or persons *non compos mentis*, and by such partial sale the residue would be greatly injured, and the same shall be represented and made to appear to either of the aforesaid courts, on petition and declaration, filed and duly proved therein by the said executors, administrators, or guardians, the aforesaid courts respectively may authorize and empower such executors, administrators, or guardians, &c., to sell and convey the whole, or so much of said real estate as shall be most for the interest and benefit of the parties concerned therein, at public auction, and good and sufficient deeds of conveyance therefor to make and execute ; which deed or deeds, when duly acknowledged and recorded in the registers of deeds for the county where the said real estate lies, shall make a complete and legal title in fee to the purchaser or purchasers thereof.

“ Provided the said executors, administrators, &c., give thirty days' public notice of such intended sale, in manner and form hereinbefore prescribed.

“ And provided also, that they first give bonds, with sufficient sureties, to the judge of probate for the county where the deceased testator or intestate last dwelt and his estate was inventoried, that he or she will observe the rules and directions of law for the sale of real estate by executors or administrators ; and the proceeds of such sale, after the payment of just debts, legacies, taxes, and just debts for the support of minors, and other legal expenses and incidental charges, shall be put on interest, on good securities, and that the same shall be disposed of agreeably to the rules of law.

“ Sect. 3. That every representation to be made as aforesaid, shall be accompanied with a certificate from the judge of probate of the county where the deceased person's estate was inventoried, certifying the value of the real estate and of the personal estate of such deceased person, and the amount of his or her just debts, and also his opinion whether it be necessary that the whole or a part of the estate should be sold ; and if part only, what part.

“And the said courts, previous to their passing on the said representation, shall order due notice to be given to all parties concerned, or their guardians, who do not signify their assent to such sale, to *show cause at such time and place as they shall [*322] appoint, why such license should not be granted.

“And in case any person concerned, be not an inhabitant of this territory, nor have any guardian, agent, or attorney therein, who may represent him or her, the said justices may cause the said petition to be continued for a reasonable time; and the petitioners shall give personal notice of the petition to such absent person, his or her agent, attorney, or guardian, or cause the same to be published in some one of the newspapers in this territory three weeks successively.

“And the said courts, when they think it expedient, may examine the said petitioner on oath, touching the truth of facts set forth in the said petition, and the circumstances attending the same.

“Sect. 7. That real estate is, and shall be liable to be taken and levied upon by any execution issuing upon judgments recovered against executors or administrators in such capacity, being the proper debts of the testator or intestate; and that the method of levying, appraising, and recording, shall be the same as by law is provided respecting other real estates levied upon and taken in execution, and may be redeemed by the executor, administrator, or heir, in like time and manner.”

Act to direct Descents, sect. 17. “Whereas it sometimes happens, that for want of prudent management in executors, administrators, &c., who are empowered to sell real estates, such estates are disposed of below their true value, to the great injury of heirs and creditors; therefore, every executor, administrator, &c., who may obtain a legal order for selling real estate, shall, previous to the sale, before the judge of probate, or some justice of the peace, take the following oath: ‘I, A B, do solemnly swear, that in disposing of the estate belonging to ———, now deceased, I will use my best skill and judgment in fixing on the time and place of sale, and that I will exert my utmost endeavors to dispose of the same in such manner as will produce the greatest advantage to all persons interested therein, and that without any sinister views whatever.’

“And the said executor, administrator, &c., shall return to the judge of probate a certificate of the same, under the hand of the justice before whom such oath was taken.”

* *Choate*, for the plaintiffs in error.

[*329]

Crittenden and Lord, for the defendants in error.

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[* 335] * BALDWIN, J., delivered the opinion of the court.

This case comes here on a writ of error from the supreme court of the territory of Wisconsin, the premises in controversy were formerly owned by one Peter Grignon, to whom they were confirmed by an act of congress, passed 21st February, 1823,¹ to be found in 3 Story's Laws, 1877. He died in March following, intestate, indebted, and leaving two sons who are lessors of the plaintiff, one born in 1803, the other in 1806. They conveyed one third to Martin, the other lessor, in 1834. The lessors claim as heirs at law of Peter Grignon, and the conveyance from them to Martin.

In 1824, letters of administration on the estate of Peter Grignon, were duly granted to Paul Grignon, the brother of the deceased, who gave bond for the performance of the trust, according to law. In January, 1826, he presented his petition to the county court of

Brown county, then in the Territory of Michigan, praying [* 336] for an * order from the court, to authorize him to dispose of the real estate of the said Peter, which was granted, a license issued to the administrator to sell in March, 1826. A sale was accordingly made to Augustin Grignon, to whom a deed was executed by the administrator in June, 1826, and duly recorded. The defendants claim title under this sale by sundry mesne conveyances from the purchaser.

The law of Michigan is set forth in the statement of the case by the reporter.

In the county court the following proceedings were had : —

“At a session of the county court for the county of Brown, begun and held at the township of Green Bay, in the school-house, on Tuesday, the tenth day of January, one thousand eight hundred and twenty-six.

“Present: the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice. The court was opened by George Johnston, sheriff.

“The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the county of Brown, (deceased,) was filed by his attorney, H. S. Baird, praying for an order from the court to authorize him to dispose of the real estate of said Pierre.

“In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid.

“Minutes read, corrected, and signed by order of the court.

ROBERT IRWIN, Jun., *Clerk.*”

¹ 8 Stats. at Large, 724

TERRITORY OF MICHIGAN, } ss.
Brown County,

The United States of America, to Paul Grignon, administrator of
 Pierre Grignon, deceased.

Be it known, to all whom it may concern, that at a term of the county court of the county of Brown, continued and held at the township of Green Bay, in said county, on Tuesday, the tenth day of January, in the year of our Lord one thousand eight hundred and twenty-six, before the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice, Paul Grignon, administrator of all and singular the goods and chattels, rights and credits, lands, and tenements of Pierre Grignon, deceased, late of the county of Brown aforesaid, represents to this court, then and there in session, that the said Pierre died intestate, at Green Bay, in said county of Brown, on the fourth day of March, A. D. 1823; that at the time of his death * the said Pierre was seised in his demesne as of [* 337] fee in and to the following tracts or lots of land, situated at Green Bay aforesaid, to wit:—

Lot number three, on the east side of Fox River, bounded north by land claimed by the estate of Dometile Longevin, south by Augustin Grignon, and four and a half arpens in front, and eighty arpens rear.

Also, lot number five, on the same side of said river, bounded north by Augustin Grignon's claim, and south by land claimed and occupied by John Lawe, Esq., being four acres and sixteen feet wide, and extending back eighty acres.

Also, lot number three, in dispute between said deceased and George Johnston, on the west side of said Fox River, lately occupied by said George Johnston, bounded north by Louis Grignon, and south by land of said deceased, being eight chains and sixty-two links wide, and eighty arpens deep.

Also lot number four, on the same side of said river, bounded north by the last-mentioned claim, and south by land claimed by John Lawe, Esq., being eight chains and fifty links wide, and extending back eighty arpens.

And that it has been ascertained by the petitioner that the goods and chattels belonging to the estate of the said deceased are insufficient to pay all the just debts which he owed at the time of his death, but that the estate will be insolvent; and therefore prays that leave may be granted him to dispose of the tracts and lots of land aforesaid.

Now, therefore, for the causes aforesaid, and for divers other good and sufficient reasons, the court thereunto moving, they do hereby authorize and empower you, the said administrator, to dispose of all

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the right, title, and interest of the deceased in and to the above-described tracts and lots of land in such manner as will best serve the interest of all concerned in said estate, requiring of you a due observance of the statute in such case made and provided.

Witness, James Porlier, chief justice of the county court of the county of Brown, at the township of Green Bay, on the 28th of March, A. D. 1826. ROBERT IRWIN, Jr., *Clerk, B. C.*

At the trial, numerous questions of evidence arose, and many instructions were asked of the court, to whose opinion the plaintiffs excepted; but we do not deem it necessary to notice them in detail, as in our opinion the whole merits of the controversy depend [* 338] on one * single question; had the county court of Brown county jurisdiction of the subject on which they acted?

Jurisdiction has been thus defined by this court.

“The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition containing all the requisites, and in the manner required by law.” 6 Pet. 709. “Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial, or extra-judicial, with, or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it.” 12 Pet. 718; S. P. 3 Pet. 205. It is a case of judicial cognizance, and the proceedings are judicial. 12 Pet. 623.

This is the line which denotes jurisdiction and its exercise, in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land, 11 S. & R. 432; they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who may have an interest in it; all the world are par-

ties. In the orphans' court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title, but one paramount. 11 S. & R. 426. The estate passes to him by operation of law. 11 S. & R. 428. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties, 11 S. & R. 429, which directs the title of the deceased. 11 S. & R. 430.

As the jurisdiction of such courts is irrespective of the parties in *interest, our inquiry in this case is whether the [*339] county court of Brown county had power to act in the estate of Peter Grignon, on the petition of the administrator under the law of Michigan, providing, that where the goods and chattels of a decedent are not sufficient to answer his just debts, on representation thereof, and the same being made to appear to the county court where he dwelt, or where his real estate lies, it may license the executor or administrator to make sale of so much as will satisfy the debts and legacies.

No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt, or his real estate was situate, making these facts appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representation; for whenever that was before the court, they must hear and determine whether it was true or not; it was a subject on which there might be judicial action. The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition, into consideration, and for these and divers other good reasons, ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes that they were such as to justify their action. 14 Pet. 458. But though the order of the court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. 3 Pet. 202; 2 Pet. 165. We all know that even in the old States, the records of these and similar

proceedings are very imperfectly kept, that where it consists of separate pieces of paper, they are often mislaid or lost by the carelessness of clerks and their frequent changes; regular entries of the proceedings are not entered on the docket as in adversary cases, nor are the facts set forth in the petition entered at large; and it is no matter [* 340] of surprise that in so new and remote part of the country * as the place where these proceedings were had, this state of things should exist. Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on files, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject-matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence, or decree. 2 Pet. 165. The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale, unless in a case under the 3d section. The subsequent provisions of the act of Michigan, relate exclusively to acts and proceedings in the execution of the order of sale, or are directory to the administrator to accompany the representation with a certificate of the judge of probate, and to the court, before passing on such representation, to order notice to be given to the parties concerned, to show cause why the license should not be granted; but these provisions do not affect the jurisdiction of the court, they apply only to its exercise. After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court; their order of sale is evidence of that or any fact which was necessary to give them power to make it, and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter.

The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court

having power to make the *décree*, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the "most palpable kind, if the court, which rendered it, have, in [* 341] the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Pet. 205. They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent, by its constitution, to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities. The circuit court of this district has original, exclusive, and final jurisdiction in criminal cases, its judgment is a sufficient cause on a return to a writ of *habeas corpus*; "on this writ this court cannot look behind the judgment and reëxamine the charges on which it was rendered. A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as con-

[* 342] clusive on *all the world as the judgment of this court would be. It is as conclusive in this court as it is on other courts. It puts an end to all inquiry into the fact by deciding it." 3 Pet. 204, 205.

"To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its (the circuit court) powers and duties; the decision of the question is the exercise of jurisdiction, whether the judgment be for or against the prisoner, it is equally binding and remains in full force until reversed." 3 Pet. 204, 205.

If the jurisdiction of the court in a civil case is not alleged in the "pleadings, the judgment is not a nullity, but though erroneous, is obligatory as one, 3 Pet. 206; and in a proceeding *in rem*, an erroneous judgment binds the property on which it acts; it will not bind it the less because the error is apparent, and the judgment is of complete obligation." 3 Pet. 207. The judgment of the circuit court, in a criminal case, "is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decision." 3 Pet. 207.

These principles have been applied by this court to sales made under the decrees of orphans' courts; where they have power to judge of a matter of fact, "they are not required to enter on record the evidence on which they decided that fact. And how can we now say but that the court had satisfactory evidence before it, that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the court depended on that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question in this collateral way, is certainly not warranted by any principle of law." 2 Pet. 165, *Thompson v. Tolmie*.

"If the purchaser (under a decree of the orphans' court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men." 2 Pet. 168, cited 11 S. & R. 429.

"The purchaser is not bound to look further back than the order of the court. He is not to see whether the court were mistaken in the facts of debts and children. The decree of an orphans' court in a case within its jurisdiction is reversible only on appeal, [* 343] and not *collaterally in another suit. A title under a license to the administrator to sell real estate "is good against the heirs of the intestate, although the license was granted upon the cer-

tificate of the judge of probate, not warranted by the circumstance of the case."

"The license was granted by a court having jurisdiction of the subject; if it was improvidently exercised, or in a manner not warranted by the evidence from the probate courts, yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a court of competent jurisdiction." 2 Pet. 168, and 11 Mass. 227, cited.

In that case the jurisdiction of the court was held to attach "when the acceptor dies intestate, and any of the persons entitled to his estate is a minor, 2 Pet. 165; so in this case it attaches on the decease of any person indebted beyond the personal estate he leaves, and when jurisdiction is once attached to a subject, or exists over a person, this court has adopted as a rule applicable to all courts of records that their decisions are conclusive: "it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court." 1 Pet. 340. In *Voorhees v. The Bank of the United States*, the same principle is applied to sales or executions under judgments on adversary process, and such must hereafter be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem*, as *in personam*. 10 Pet. 473.

We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents, by order of those courts to whom the laws of the States confide full jurisdiction over the subjects.

These sales are less expensive than when made on executions; more time is allowed to make them; the discretion of the court is exercised as to time, manner, and the terms of sale; whereas on sales * by a sheriff, all is by compulsion, and no credit is [* 344] allowed; he cannot offer one entire piece of property for sale in parcels; the administrator can divide and sell as best subserves the interest of the heirs, and sell only so much as the emergency of the case requires.

It has been contended by the plaintiff's counsel, that the sale in the present case is not valid, because Peter Grignon had not such an estate in the premises as could be sold under the order of the county court, it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the act of congress of February, 1823, which was equivalent to a patent. It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States by the government itself, whereas the patent was only the act of its ministerial officers.

These views of this case decide it, without examining the exceptions to the admission of evidence, the ruling of the court on the instruction prayed, or their charge to the jury. So far as either were unfavorable to the plaintiff, they are most fully sustained by the foregoing principles and cases; the county court of Brown county had undoubted jurisdiction of the subject; their proceedings are irreversible; the title of the purchaser cannot be questioned; and the judgment of the court below must be affirmed, with costs.

7 H. 172; 8 H. 402; 9 H. 421; 12 H. 371; 17 H. 239; 18 H. 158, 497; 22 H. 1; 24 H. 195; 1 Wal. 604; 2 Wal. 210, 328; 3 Wal. 396.

PIERRE CHOUTEAU, Sen., Plaintiff in Error, v. WILLIAM ECKHART.

2 H. 344.

Though this court has not jurisdiction under the 25th section of the Judiciary Act of 1789, (1 Stats. at Large, 85,) to examine a perfect Spanish title, and decide whether the state court had given due effect thereto, yet if an imperfect Spanish title has been acted on by congress, and this court is called on to review the decision of a state court upon such statute title, this court must examine the Spanish title, for the purpose of ascertaining what effect the act of congress had thereon.

Incomplete Spanish titles were not rendered complete by the treaty by which Louisiana was acquired; the government of the United States succeeded to the powers and duties of the crown of Spain as to confirmations of such titles, and where there were two adverse claimants, might select between them, and make a perfect title to one and wholly exclude the other.

The titles to village lots and commons in upper Louisiana described.

A confirmation, by act of congress of July 4, 1836, (5 Stats. at Large, 126,) held to make a good legal title, without a patent.

ERROR to the supreme court of the State of Missouri.

The plaintiff in error, who was plaintiff in ejectment in the state court, claimed title under a concession made upon his petition by Delassus, commandant and lieutenant-governor of upper Louisiana, on the 26th of November, 1800, which was as follows:—

St. Louis of Illinois, 26th November, 1800.

[* 347] * Having seen the foregoing information and the just rights stated by Don Pedro Chouteau, to whom an unexpected

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accident has deprived of his title of concession, and considering that he has been for a long time proprietor of the land in question, the surveyor of this upper Louisiana, Don Antonio Soulard, shall put him in possession, in the manner solicited, of the tract of land he petitions for; and the survey being executed, he shall draw a plat of said survey, which he shall deliver to the interested party, to serve to the said party to obtain the title in form from the general intendency, to which tribunal alone * corresponds, by royal [* 348] order, the distributing and granting all classes of lands of the royal domain.

CARLOS DEHAULT DELASSUS.

The action of the boards of commissioners, and of congress, upon this title, is detailed in the opinion of the court.

The defendant claimed title under two concessions of commons, made to the inhabitants of the village of St. Charles, by the same Delassus, upon their petition. The concessions were as follows:—

St. Louis of Illinois, February 26, 1801.

* All concessions and augmentations of property must be [* 349] granted by the intendant of these provinces, on a petition which is to be presented by those persons claiming lands; but if the commons of the inhabitants of St. Charles is not sufficient for their cultivation, we do permit them, provisionally, to enlarge the same according to their wishes, without insuring to them the right of property, which they are to apply for as above mentioned. And the provisional lines of the said augmentation shall be drawn by Captain Antoine Soulard, surveyor of upper Louisiana, who is the only person authorized to survey under our orders. It being well understood that nothing shall be done to the prejudice of any person.

(Signed)

CARLOS DEHAULT DELASSUS.

On the 23d of February, 1804, Delassus issued another order as follows:—

C.—In consequence of the representation of the inhabitants of your post, which appears to me very just and well founded, after my decree of 26th February, in the year 1801, by which the augmentation therein mentioned is granted to them, and for which they have asked a survey by their petition of 27th April of the same year; which petition you have kept to this day without making it known to me, for which I hold you responsible—I apprise you that the surveys made in the said place cannot belong to any individual, but to the commons of St. Charles. Therefore, you shall notify those who

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have had surveys made in the said place of this disposition, and you shall take the necessary measures for the execution of the whole survey asked for by the said petition of 27th April, according to the aforesaid decree of 26th February, in the year 1801.

May God have you in his holy keeping.

Signed in the original,

CARLOS DEHAULT DELASSUS.

Mr. Charles Tayon.

St. Louis of Illinois, 23d February, 1804.

A survey by Soulard, the surveyor-general of the province, bearing date March 2, 1804, was produced, and evidence given by the defendant, tending to show that this survey embraced the premises in question and that they were inclosed as part of the commons. The action of congress on the claim of the inhabitants of St. Charles, is stated in the opinion of the court.

The court below, on motion of the defendant, instructed the jury, "that if they believed the premises in controversy are included in the tract of land surveyed under the authority of the Spanish lieutenant-governor of upper Louisiana, for the commons of the town of St. Charles, and held by the inhabitants of the said town, and inclosed by them as their commons, under the Spanish government, the plaintiff cannot recover in this action."

The plaintiff excepted, and the jury having found for the defendant, who had a judgment, the case was carried to the supreme court, the judgment was then affirmed, and thence it was brought here by a writ of error under the 25th section of the Judiciary Act of 1789.

Lawless and Bogg, for the plaintiff.

Gamble, contra.

[* 372] * CATRON, J., delivered the opinion of the court.

For the statement of the facts, the report is referred to.

It is insisted, this court has no jurisdiction to look into the plaintiff's concession of 1800, or to pass on it, under the 25th section of the Judiciary Act; and the case in 9 Pet. 224, of *New Orleans v. De Armis*, is referred to as settling the question. If the plaintiff relied alone on a complete Spanish title, then the argument would be sound; but each party claims by force of an act of congress; the plaintiff under that of 1836, and the defendant under the act of 1812,¹ confirming to the inhabitants of St. Charles the village commons; and which is fortified by another act for the same purpose, of 1831.²

¹ 5 Stats. at Large, 748.

² 4 Ib. 435.

The decision of the supreme court of Missouri was opposed to the title set up, under the act of 1836, by the plaintiff. From this decision he prosecuted a writ of error to this court.

Construction is called for on the acts on which both titles are founded; and, as no occasion can arise in any instance involving construction, aside from a contest, making a case, the facts giving rise to it must be ascertained before the construction can be applied. To hold otherwise, would render the 25th section a dead letter in a majority of instances. The same question arose in the case of Pollard's Heirs v. Kibbe, 14 Pet. 353; and, again, in that of The City of Mobile v. Eslava, 16 Pet. 234, both involving property at the city of Mobile; the first is not distinguishable from the present in its material features, so far as the question of jurisdiction is involved; and the latter covers the whole ground before us. In the cases cited, as in this, the record set out the titles on each side, together with the facts and charge of the court; from which it appeared the decision of the supreme court of Alabama was opposed to the plaintiff's title, the judgment below having been affirmed. This court did not then doubt its powers to look behind the act of congress, into the Spanish concession of Pollard, for the purposes of construing the act, and comparing it with that under which the defendant claimed; not with the intention of setting up the concession as an antecedent title to the act, that would support an action, but for the purposes of the construction and application of the acts on which the controversy depends. And the same rules apply here.

The plaintiff's title is *prima facie* a good legal title, and will support an ejectment on the act of 1836, standing alone, if the land can be identified, as confirmed, without resort to the patent. This court held, in Strother v. Lucas, 12 Pet. 454: "That a grant may be made by a law as well as a patent pursuant to a law, [* 373] is undoubted, and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained, in terms, a grant *de novo*." And as, according to the laws of Missouri, an action of ejectment could be prosecuted on Chouteau's title, by force of the confirmation, the construction of the acts of congress, under which the respective parties claim, will decide the controversy.

The character and nature of the village right in this country, is somewhat peculiar. The inhabitants of upper Louisiana resided in villages, almost exclusively, and cultivated common fields, inclosed by only one fence; each person, who cultivated the soil, having assigned to him, by the syndic of the town, a certain portion of land to cultivate. In this manner, the chief tillage of the soil was carried on; the other parts of the country being in the forest state.

The villages also required commons for pasturage for their horned cattle and horses, and for fuel and timber; this part not being inclosed. The quantity included in the field for pasturage, timber, and wood, was regulated by the nature of the soil and timber, and accommodated to the wants of the inhabitants, and conceded at the discretion of the government, usually to very liberal extent.

As the principal support of the population was derived from agriculture and pasturage, the village commons were deemed of primary importance by the people and government, and as a common title more favored than individual titles in cases of conflict.

In this situation, the United States found the country when they came into possession of it, in March, 1804, as the successor of France, or rather Spain, in virtue of the treaty of cession.¹ So great has been the change by the introduction of a population with different habits and modes of agriculture, that it is difficult to estimate, at this day, the former importance of the village common to the French inhabitants. It was the basis on which their society was formed to so material an extent, that the early acts of congress could not be well understood, without a reference to this important circumstance; and especially not the sweeping act of 1812.

The lieutenant-governor of upper Louisiana, (usually the military commandant,) made concessions for lands founded on such considerations as to him seemed just, and according to the policy of the province; ordered it to be surveyed by the public surveyor, who put the interested party into possession, pursuant to the lieutenant governor's order, and delivered a plat of the survey to the party, [* 374] in * order that he might obtain a title in form from the general intendency at New Orleans; to which tribunal alone appertained, by royal order, the distributing and granting all classes of lands of the royal domain. The intendant-general had the power to adjudge on the equity of the claim, and to exercise the sovereign authority, by making the grant, as the king's deputy.

After the country changed owners, this government had imposed on it, as the successor of Spain, the duties previously performed by the general intendency, of perfecting titles to concessions made by the lieutenant-governors of St. Louis, Illinois.

Shortly after the United States came into possession, a tribunal was instituted, consisting of a board of commissioners, to investigate claims of this description, according to the laws and usages of Spain, as they existed among the French population in upper Louisiana; and to report to congress such as were by the tribunal deemed well-

¹ 8 Stats. at Large, 200.

founded, just, and equitable, and that ought to have been confirmed by the general intendency, had no change of government taken place, and such as ought not to have been confirmed. On these reports coming before congress, it acted directly, by statute, on such titles as were by the legislature considered well-founded and just claims. In all such instances, it acted as the successor of the general intendency, and had the same discretion to confirm, and the sovereign power to perfect the incipient right, or to reject it, that the intendant-general had; each exercising sovereign power in regard to the claim, with full authority to award or to refuse a perfect title.

As the board of commissioners had no capacity to grant, but only to ascertain facts, and report their opinions, and their powers to examine not extending to every description of claim, congress acted in some instances independent of any recommendation, necessarily in cases where the board had no right to interfere.

Chouteau's claim had been presented to the board early in 1809. In July, 1810, the board declared the opinion that this claim ought not to be confirmed; and no action was had on it by congress on the return of the report of 1810.

In 1812, congress confirmed the village claims as follows:—

“That the rights, titles, and claims to town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage de Sioux, St. Charles, St. Louis, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are * hereby confirmed to the inhabitants of the [*375] respective towns or villages aforesaid, according to their several rights or right in common thereto.”

A new board was organized according to an act of 1832,¹ with powers to reëxamine the claims (with others) deemed unworthy of confirmation by the former board. The new board was of a different opinion from the former in regard to Chouteau's claim; and, in November, 1833, recommended it for confirmation, according to his concession; and it was confirmed by the act of the 4th of July, 1836, corresponding to a recent survey made in conformity to the concession. The whole of the claim is included in the village common of St. Charles, as it existed on the 20th day of December, 1803; and under which the defendant protected his possession, as an outstanding title. The state circuit court in Missouri held the village right the better, and so charged the jury; which opinion was sustained in the supreme court of that State, on their former decisions; especially

¹ 4 Stats. at Large, 565.

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in the cases of *Byrd v. Montgomery*, 6 Mo. 514, and *Mackay v. Dillon*, 7 Mo. 10. The last involved a contest in which title was claimed by one party under the St. Louis Common.

These cases maintain in substance, that such inchoate claims (as that of *Chouteau* was in 1812, when the community of St. Charles took its title, previously also inchoate,) were not changed in their character by the treaty by which Louisiana was acquired; that the treaty imposed on this government only a political obligation to perfect them; that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals; and that the legislation of congress, from 1804 to the present time, has proceeded upon this construction of the treaty, as is manifested by the modes adopted to investigate the claims through boards of commissioners, and then acting on them by legislation. This court held likewise, in the *United States v. Wiggins*, 14 Pet. 350.

We think this reasoning correct, and necessarily following the nature of the claim as above set forth, it not having been perfected by the general intendency before the change of governments.

2. That court in substance also held, in the cases cited, that the federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles. Each claimant depends upon the justice or comity of the present government; and when the government exercises its powers and confirms the land to one, it must necessarily be considered in a court of law the paramount and better title.

We think this position also sound, and that it is conclusive against the validity of the plaintiff's title; and therefore order the judgment of the supreme court of Missouri to be affirmed.

8 H. 778; 4 H. 169, 449; 7 H. 586; 10 H. 348; 11 H. 529; 19 H. 334; 22 H. 198, 334;
1 B. 179.

JOHN CATTS, Plaintiff in Error, v. JAMES PHALEN and FRANCIS MORRIS, Defendants in Error.

2 H. 373.

The court is not bound to give a modified instruction, different in substance from what is requested; and if an instruction be not substantially correct, in reference to the evidence, in the terms in which it is prayed for, its refusal is not error.

Where the defendant was employed by the plaintiffs to draw an illegal lottery, and fraudulently induced the plaintiffs to believe that a certain ticket had drawn a prize, and to pay the amount of such prize to one who held the ticket and received the money for the defendant, — *Held*, that the illegality of the lottery was not a defence to an action for money had and received; and that, if the defendant was of age when he obtained the money, infancy was not a defence to the action.

ERROR to the circuit court for the District of Columbia, in an action for money had and received.

The State of Virginia, in and before 1834, having authorized certain lotteries, the defendants in error were authorized by parties interested, to draw a lottery for the improvement of a turnpike road in that State; and they employed the defendant to do the manual acts of drawing the numbers, and so determining the prizes. The defendant secretly caused a ticket to be purchased for him, and fraudulently pretended to have drawn the number of that ticket, so as to entitle it to a prize of \$15,000; and the plaintiffs, believing that this ticket had drawn that prize, paid the money, in 1841, to the person who secretly acted for the defendant.

The plaintiffs brought their action to recover back this money, and, having shown these facts, the defendant relied on an act of assembly of Virginia, which took effect in 1837, suppressing all lotteries within that State, and also upon his infancy; and requested the court to instruct the jury that:—

“If the jury shall believe, from the said evidence, that the said lottery was drawn under the said act of the commonwealth of Virginia, and the said contract so given in evidence as aforesaid, that then the * said lottery was illegal; and if plaintiffs [* 379] paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover. And if the jury shall further believe, from the said evidence, that in December, 1840, when the said lottery was drawn, said defendant was an infant under the age of twenty-one years, that then the plaintiffs are not entitled to recover in this action.”

Which instruction the court refused—the defendant excepted.

The jury returned a verdict in favor of the plaintiffs for \$12,500, to bear interest from 15th March, 1841.

Upon this exception, the case came up to this court.

Coxe and Semmes, for the plaintiff in error.

Jones and Brent, for the defendants in error.

* BALDWIN, J., delivered the opinion of the court. [* 380]

Phalen and Morris brought an action in the court below, to recover from Catts the sum of \$12,500, which they alleged he had received for their use, and being so indebted, promised and assumed to pay, to which the plaintiff plead the general issue.

It appeared in evidence on the trial, that the legislature of Virginia had authorized lotteries, to raise money for improving a turn-

pike road in that State, which were placed under the superintendence of commissioners appointed under those laws, who, by articles of agreement contracted with the plaintiffs, to manage and [*381] conduct the drawing * of the lotteries authorized by the laws, on certain terms therein stipulated, one of which took place in Virginia, under the circumstances set forth in the statement of the case by the reporter.

In the argument for the plaintiff in error here, it has been contended that this lottery was illegal by the suppressing act of 1834, which precluded a recovery of the money he received; but as, in our opinion, this cause can be decided without an examination of that question, we shall proceed to the other points of the case, assuming for present purposes the illegality of the lottery.

Taking, as we must, the evidence adduced by the plaintiffs below to be in all respects true after verdict, the facts of the case present a scene of a deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove nor mitigate at the trial, the consequence of which is, that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and in point of law, he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs, by means of any other false pretence, and he is estopped from avowing that the lottery was in fact drawn.

Such being the legal position of Catts, the case before us is simply this: Phalen and Morris had in their possession \$12,500, either in their own right, or as trustees for others interested in the lottery, no matter which; the legal right to this sum was in them; the defendant claimed and received it by false and fraudulent pretences, as morally criminal as by larceny, forgery, or perjury; and the only question before us is, whether he can retain it by any principle or rule of law.

The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to, or drew the prize; it was paid and received on the false assertion of that fact; the contract which the law raises between them, is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case, even if the instructions prayed by the defendant had been broader than they were. The instructions

prayed were, 1. That if the jury believed from the evidence, that the lottery was drawn under the law of Virginia, and the contract referred to, then * the lottery was illegal; and if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiff cannot recover. 2. That if the jury shall believe from the evidence, that in December, 1840, when the lottery was drawn, the defendant was an infant, the plaintiffs are not entitled to recover in this action.

A party cannot assign for error, the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the court is not bound to give a modified instruction varying from the one prayed; here, they were asked to instruct the jury, that the belief of the plaintiff that the ticket had been fairly drawn, and the consequent payment, prevented a recovery, without referring to the fact in evidence, that that belief was caused by the false and fraudulent assertions of the defendant.

The second instruction asked was, that the plaintiffs could not recover, if the defendant was a minor in December, 1840, which the court properly refused, because they were not asked to decide on the effect of his minority when the money was received in February, 1841; and because, if he had then been a minor, it would have been no defence to an action founded on his fraud and falsehood.

The first instruction, if granted, would have excluded from the consideration of the jury, all reference to the fraud which produced such belief in the plaintiff, and they must have given it the same effect, whether it was founded in fact, or caused by the false asseveration of the fact by the defendant, knowing it was a falsehood, and thus depriving the jury of the right to decide on the whole evidence.

The second instruction asked would, if granted, have also taken from the jury the right of finding for the plaintiff, if the defendant had been of full age when the fraud was successfully consummated by the receipt of the money, which was the only fact on which the law could raise a promise to repay, for certainly none could be raised at any previous time; so that, had these instructions been given, the verdict must have been rendered for the defendant without taking into view the only evidence on which the plaintiff relied, whether it was available in law or not.

For these reasons, the judgment of the circuit court is affirmed, with costs.

JANE DADE, Complainant, v. THOMAS IRWIN, Jun., Executor of
THOMAS IRWIN, deceased, and WILLIAM L. HODGSON, Defendants.

2 H. 383.

A decree having been made for a sale of real property conveyed to a trustee to secure payment of a debt, a bill does not lie to restrain the sale on account of a claim to set-off an independent debt, no peculiar equity, such as the insolvency of the debtor, the plaintiff in the first suit, having intervened.

Courts of equity do not take jurisdiction to compel offsets of unconnected debts, generally; there must be some special ground for the relief, such as mutual credit on the faith of the debts.

A court of equity will not interfere to compel an offset of a stale and suspicious claim.

THE case is stated in the opinion of the court.

Neale and Brent, for the appellant.

Jones, contra.

[* 389] * STORY, J., delivered the opinion of the court.

This is an appeal from the circuit court of the District of Columbia, sitting in Alexandria.

In the year 1824, the appellant, Jane Dade, became indebted to Thomas Irwin, the testator, and executed two deeds of trust for the security of the debt. At the November term of the circuit court of Alexandria county, 1830, Irwin, the executor, filed his bill to obtain a decree of the sale of the estate so conveyed in trust; and a decree was made without objection for the sale, the appellant admitting the justice of the claim; and the original trustee having become insane, William L. Hodgson was appointed trustee to make the sale. After sundry delays, the trustee advertised the estate for sale on the 28th of November, 1834; and on the day preceding the intended sale the present bill was filed by the appellant for an injunction against the sale. The bill made no objection to the original debt or decree, but simply set up a claim, by way of set-off or discount, of a totally distinct nature, and unconnected with the original debt, as due by the testator to her, and for which she alleged in her bill that she ought to receive a credit, to which in equity and strict justice she was entitled. The claim thus set up had its origin in this manner. In May, 1821, James Irwin gave his note for \$826.63 to John Adam or order, for Mrs. Dale, for money borrowed of her, which note was indorsed by Adam, and on the same day James Irwin, as collateral security therefor, assigned to Adam a debt due to him by Alexander Henderson for cordage sold him by Thomas Irwin (the testator) as his agent, and for which the assignment alleged Thomas Irwin was liable, having received Henderson's note without the consent of

James Irwin. Upon the back of this assignment there now purports to be the following indorsement: "If the within debt cannot be recovered from Alexander Henderson, I am liable for the same, provided full time be allowed for the prosecution of the suit." The supposed note referred to in the assignment, was dated in January, 1804, and was for the payment of \$901.83 to the order of Thomas Irwin, and was signed by Alexander Henderson and Co. This note the bill alleged to include the debt due to James Irwin. Judgment was obtained upon this note in 1805. Afterwards Henderson, in 1806, became insolvent, and in 1816 a bill in equity was filed for the satisfaction of the judgment out of supposed effects in the hands of certain garnishees, which suit was not finally disposed of until October, 1835, and was then abated by Henderson's death.

*The answer to the present bill by Thomas Irwin, the [* 390] executor, denied the whole equity thereof. It denied that James Irwin ever executed the supposed assignment. But he admitted the origin of the debt due by Henderson and Co., and that the note taken by the testator, included it; but that Henderson, having become insolvent, he was not liable for that amount, and charged it in his accounts against James Irwin and Co. He also denied the supposed indorsement on the assignment to be genuine, but alleged the same to be a sheer fabrication.

The injunction prayed for by the bill was granted, and afterwards the court directed an issue to be tried by a jury to ascertain whether the testator's signature to the indorsement was genuine or not. That issue was tried by a jury, who were unable to agree upon a verdict. The order for an issue was then rescinded, and the cause came on for a final hearing in 1839, when the bill was dismissed with costs. There is a great deal of evidence on both sides as to the genuineness of the signature of the testator, and also as to the appearance of the ink of the indorsement being that of recent writing. It is also remarkable that in the long interval between the time when the deed of trust was given in 1824, and the time when the sale was advertised and the bill filed, no demand was ever suggested by or on behalf of Mrs. Dade for the present supposed debt due her as a set-off or otherwise. On the contrary, although repeated and earnest applications were made for delay of the sale, from the time of the decree in 1830 until the advertisement in 1834, and some correspondence took place on the subject, no allusion whatsoever was made to any such supposed claim or set-off; but an entire silence existed on the subject. It is also somewhat singular, that when the bill upon the trust deed was filed and the decree therein obtained, no suggestion was made by Mrs. Dade in answer thereto of this supposed

claim, nor any postponement of the decree of sale asked upon this account.

Now, upon this posture of the case, several objections arise as to the maintenance of the suit. In the first place, the present bill is of an entirely novel character. It is not a bill of review, or in the nature of a bill of review, founded upon any mistake of facts, or the discovery of any new evidence. It admits in the most unambiguous terms that the decree was right. Then, it sets up merely a cross-claim or set-off of a debt arising under wholly independent and unconnected transactions. Now it is clear that courts of equity

do not act upon the subject of set-off in respect to dis-
[* 391] tinct and *unconnected debts, unless some other peculiar equity has intervened, calling for relief; as, for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other.¹ In the next place, the remedy for Mrs. Dade, if any such debt as she has alleged exists, is at law against the executor; and there is no suggestion that the estate of the testator is insolvent, and that his assets cannot be reached at law. So that the bill steers aside of the assertion of any equity upon the foundation of which it can rest for its support.

In the next place, the nature and character of the claim itself, now for the first time made, long after the decease of both the Irwins, and thirteen years at least after its supposed origin. To put the case in the least unfavorable light, it is a matter of grave doubt whether the indorsement of the testator's name on the assignment is genuine or not. That very doubt would be sufficient to justify this court in affirming the decree of the court below, and leaving Mrs. Dade to her remedy at law, if any she have. But connecting this with such a protracted silence for thirteen years, without presenting or making any application for the recognition or allowance of the claim to the testator or his executor, it is impossible not to feel that the merits of the claim at such a distance of time, can scarcely be made out in favor of the appellant. It is stale, and clouded with presumptions unfavorable to its original foundation, or present validity. Besides, in cases of this sort, in the examination and weighing of matters of fact, a court of equity performs the like functions as a jury; and we should not incline, as an appellate court, to review the decision to which the court below arrived, unless under circumstances of a peculiar and urgent nature.

The decree of the circuit court is, therefore, affirmed with costs.

19 H. 271; 2 B. 545; 7 Wal. 613.

¹ See 2 Story, Eq. Jurisp. §§ 1435, 1436.

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**WILLIAM J. MINOR, and CATHARINE, his Wife, Plaintiffs in Error, v.
SHUBAL TILLOTSON.**

2 H. 392.

If the record of an action at law in Louisiana contains the evidence, but no bill of exceptions, and nothing raising any points of law distinct from the evidence, this court cannot revise the judgment on a writ of error.

THE case is stated in the opinion of the court. For a motion to dismiss at a former term, see 1 H. 287.

Walker, for the plaintiffs.

Webster, contra.

M'LEAN, J., delivered the opinion of the court.

This case is brought here by a writ of error, to the circuit court for the eastern district of Louisiana.

The action was commenced in the circuit court, to recover possession of certain tracts of land specified in the petition, and for damages, &c.

The defendant set up a title to the premises and pleaded prescription, under the various laws of Louisiana.

* This cause was before this court at January term, 1833, [* 393] on a writ of error, and was reversed and sent down for further proceedings. In the court below, the death of the plaintiff was suggested, and a supplemental petition was filed, making his heirs and representatives parties to the suit. The pleadings were amended, and a jury being called and sworn, evidence was heard by them, and certain exceptions taken to its admissibility by the defendant. But afterwards, by consent of parties, the jury, before they rendered their verdict, were discharged. The cause was then submitted to the court, under an agreement between the counsel, that "the documents filed in the cause, the plans, and written depositions, contain all evidence and exhibits on which this cause was tried by the court; the whole was read, subject to all legal exceptions except as to the form of taking the verbal testimony; and all other objection to the testimony, accounts, and plans, are to be argued as though the bills of exceptions were drawn out in form, signed and filed. The agreement is made for a statement of the facts in the case."

A large mass of evidence was received from both parties, consisting of concessions and grants under the Spanish government, intermediate conveyances, documents showing proceedings in regard to the title under the laws of the United States, and parol testimony,

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involving a great variety of facts, on a consideration of all of which a judgment was rendered by the circuit court for the defendant.

From the record, it is impossible for this court to say on what grounds of law or fact the circuit court gave judgment. No point as to the admissibility or effect of the evidence was raised on the record by the plaintiffs in error in the circuit court. It seems to have been supposed that the above agreement of the counsel, that the evidence in the cause should be considered as a statement of facts, subject to all legal objections, though no objections were stated, was sufficient ground for a writ of error on which a revision of the legal questions in the case might be made in this court.

In this view, the writ of error must be considered as bringing all the facts before this court, as they stood before the circuit court. And this court, exercising a revisory jurisdiction, would be required to try the cause on its merits. This is never done on a writ of error, which issues according to the course of the common law. Under the Louisiana system a different practice may prevail. But, we had supposed, that since the decisions of the case of *Parsons v. Bedford et al.* 3 Pet.

445, there could be no misapprehension in regard to the [* 394] * proceedings of this court on a writ of error. In that case, the court say: "It was competent for the original defendant to have raised any points of law growing out of the evidence at the trial, by a proper application to the court; and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for revision. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court, and no points of law are brought under review." And the court go on to consider the effect of the act of 1824,¹ in regard to the Louisiana practice, and hold that that law does not change the exercise of the appellate power of this court.

The case referred to had been tried by a jury, but in regard to the revisory power of this court, on a writ of error, there is no material difference between that case and the one under consideration. In both cases the facts were upon the record, and this court were called upon to determine the questions of law arising upon the facts.

In the case of *Parsons*, the court do say: "That if the evidence were before them, it would not be competent for the court to reverse the judgment for any error in the verdict of the jury." And they say, the refusal of the court, to direct the evidence to be entered on the record, as required under the Louisiana practice, was not matter of error.

¹ 4 Stats. at Large, 62.

Taylor v. Savage's Executor. 2 H.

Whatever opinion, therefore, may have been entertained in regard to the effect of the act of 1824, on the practice of the circuit court of the United States, in Louisiana, before the above decision; after it, there would seem to be no ground for doubt. The practice of the circuit court in Louisiana, since the above case was decided, has conformed to the rule laid down in that case. But in the present cause there is no statement of agreed facts. If the case be revised on a writ of error, the evidence on both sides must be considered and weighed by the court, as a jury would consider and weigh it; and after adjusting the balance, the principles of law, not as they were presented to the circuit court, but as they may arise on the evidence, must be determined. This is not the province of a court of error, but of a court of chancery on an appeal from the decree of an inferior court. On such a review, not only the competency of the evidence must be decided, but also the credibility of the witnesses.

The case under consideration was a proceeding at law, and, as the legal points have not been raised by a bill of exceptions, in the circuit court, it is not a case for revision in this court. A judgment of *affirmance is, therefore, entered, at the costs of the plain- [*395] tiff in error.

1 H. 287; 5 H. 278; 8 H. 470; 20 H. 427; 1 Wal. 592.

WILLIAM TAYLOR and others, Appellants, v. GEORGE M. SAVAGE,
Executor of SAMUEL SAVAGE, deceased, Defendant.

2 H. 395.

Taylor et al. v. Savage's Executor, 1 H. 282, affirmed.

THE motion to dismiss the appeal was argued by *Morehead* and *Sergeant*, for the motion, and by *Crittenden* and *Berrien*, contra.

* STORY, J., delivered the opinion of the court. [*396]

The court have had this case under consideration, and are of opinion that it is completely governed by the decision made in the same case at the last term of this court, which is reported in 1 Howard, 282. An attempt has been made at the bar to distinguish the former decision from that now sought, by suggesting that the former proceeded mainly upon the ground that the appeal was irregularly made, and did not directly involve the question now argued. We think otherwise; and that the ground of that decision completely covers all that has been urged upon the present occasion; not as mere incidental suggestions, but as the very hinge on which the case turned. Notwithstanding the opinion of this court then

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expressed, that the case might be remanded to the district court, for the purpose of making the proper parties, the appellants have neglected, during a whole year, to take a single step for the [* 397] remanding of the * case, or instituting any proceedings in the court below ; which laches certainly ought not to produce any result in their favor.

The appeal is, therefore, dismissed, and the cause is remanded to the district court of the northern district of Alabama, with leave to the appellants to make the proper parties, and to the new administrator, Benham, to become a party to the suit ; and that such other proceedings be had as to law and justice shall appertain.

5 H. 233.

JAMES RHODES, Plaintiff in Error, v. MOSES BELL.

2 H. 397.

Though the two counties of the District of Columbia are under the same political organization, yet congress has caused the laws of Virginia to continue in force within the one, and the laws of Maryland within the other ; and a person declared by the laws of Maryland to be made free, by being brought within that State, is entitled to his liberty, though brought into the county of Washington, which was ceded by Maryland, from the county of Alexandria, which was ceded by Virginia, and though, by the law of Maryland, the owner could not directly manumit the slave who was over forty-five years of age.

THE case is stated in the opinion of the court.

Brent and *Brent*, Jun., for the plaintiff.

Bradley and *Hoban*, contra.

[* 401] * M'LEAN, J., delivered the opinion of the court.

A writ of error brings this case before us from the circuit court of the District of Columbia.

Moses Bell, the defendant in error, filed a petition in the circuit court, representing that he was held in slavery by one James Rhodes, of the said county, and prayed that his rights might be inquired into by the court. The defendant pleaded that the said Moses was not free, &c. The jury returned a special verdict, and found " that previous to the year 1837, the petitioner was the slave of a certain Lawrence Hoff, a resident of Alexandria county, in the District of Columbia ; that in the year 1837, the said Hoff, then owning and possessing the petitioner as his slave, in the county of Alexandria aforesaid, whereof he continued to be a resident, did sell and deliver the petitioner to one Little, then being a resident of Washington county, in the District aforesaid, and that the delivery of the peti-

tioner was made to the said Little in Alexandria county aforesaid, and the petitioner was immediately removed by said Little to Washington county aforesaid, to reside, and also for sale, whereof said Little was resident; that the said Little shortly afterwards, to wit, about one year or a little more, sold the petitioner to one Keeting, in Washington county, who sold and delivered him to the defendant; that since said sale to said Little, the petitioner has always been kept and held in slavery in the county of Washington aforesaid; that 'at the time of the sale and delivery of the petitioner as aforesaid by Hoff to Little, the petitioner was more than forty-five years of age, to wit, fifty-four or five years."

Upon the above facts, the circuit court held that the petitioner was entitled to his liberty. To revise this judgment, the writ of error has been prosecuted.

In the 2d section of the act of the 19th of December, 1791, the State of Maryland declared: "That all that part of the territory called Columbia, which lies within the limits of this State, shall be, and the same is hereby acknowledged to be forever ceded and relinquished to the congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil
*as of persons residing, or to reside thereon pursuant to [*402]
the tenor and effect of the 8th section of the 1st article of the constitution of government of the United States, provided that the jurisdiction of the laws of this State, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until congress shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article in the constitution before recited."

Previously to the above cession, in 1789, Virginia ceded to the United States, "ten miles square or any lesser quantity for the purposes aforesaid, as congress might direct," with the reservation "that the jurisdiction of the laws of Virginia over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until congress, having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article of the constitution before recited." This cession was accepted.

By the 1st section of the act of the 27th of February, 1801,¹ congress provided, "that the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said State to the United States,

¹ 2 Stat. at Large, 103.

and by them accepted," &c., "and that the laws of the State of Maryland as they now exist, shall be and continue in force in that part of the said District which was ceded by it, &c." The part of the District ceded by Virginia constitutes Alexandria county, and the part ceded by Maryland constitutes Washington county.

As the laws of Maryland and Virginia have been adopted by the above act of congress, within the counties respectively ceded, it will be necessary to refer to those laws, so far as they have a bearing in the present case.

By the Maryland statute of November, 1796, 2 Maxcy's Laws, 351, it is declared, "that it shall not be lawful, from and after the passing of this act, to import or bring into this State, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this State; and any person brought into this State as a slave contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this State, and shall be free."

The exceptions to the above provisions are,

1. Any citizen of the United States who removes to [*403] Maryland, *with a *bonâ fide* intention of becoming a citizen, may bring his slaves with him, or bring them within one year afterwards, provided such slaves have been in the United States three years preceding the time of their removal.

2. By the act of 1797, the above privilege is extended to the executors of such persons, dying within one year after removal, &c.

3. Any citizen of Maryland who being seised and possessed of an estate of inheritance in land in any one of the adjoining States, who employed slaves in the cultivation of said land, is at liberty to bring such slaves into the State for his own benefit, but not for sale, provided such slaves had been in one of the adjoining States before the 21st of April, 1783.

4. Slaves acquired by descent, by a citizen of Maryland, may be brought into the State to be employed by the owner, but not for sale.

5. Travellers or sojourners may bring their slaves into the State.

By a law of Virginia, passed the 17th of December, 1792, it is declared, "that no persons shall henceforth be slaves within this commonwealth, except such as were so on the 17th of October, 1785, and the descendants of the females of them." And the 2d section declares, that all "slaves which shall be brought into this commonwealth and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free." The third section imposes a penalty on any person who shall import slaves

into the commonwealth, and also upon any one who shall sell or purchase such slaves. Exception is made of a person who, with a *bonâ fide* intention of becoming a citizen of Virginia, removes into the State, and exceptions extend to some other specified cases.

By the 7th section of the act of congress of the 3d of May, 1802,¹ it is provided, that no part of the laws of Virginia or Maryland, declared by an act of congress, passed the 27th of February, 1801, concerning the District of Columbia, to be in force within the said District, shall ever be construed so as to prohibit the owners of slaves to hire them within, or remove them to the said District, in the same way as was practised prior to the passage of the above-recited act."

Again, by the 9th section² of the act of the 24th of June, 1812, congress provides, "That it shall be lawful for any inhabitants in either of the said counties (of the District) owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves therein, which would be exercised * over him, her or them, in the county from whence the [404] removal was made, any thing in any legislative act in force at this time in either of the said counties, to the contrary notwithstanding."

From the foregoing legislative action, it will be seen that the counties of Washington and Alexandria are governed by the laws of the States to which the territories composing them were respectively attached before the cession. This is especially true in regard to the importation and sale of slaves. Neither the act of congress of 1801, adopting the laws of the respective States, nor the act of 1802 above cited, made any modification of the Virginia or Maryland law in regard to slaves. It was, undoubtedly, the policy of congress, until the passage of the act of 1812, to preserve the same relation between the counties of the District, on this subject, that existed between the two States.

A slave imported from Virginia to Maryland, not within one of the exceptions named, was free by the Maryland law. And it is not pretended that Bell can be brought within any one of the exceptions. The jury found that Little purchased Bell in Alexandria county, and brought him into Washington to reside and for sale, the purchaser being a resident of Washington county. Now, independently of the act of 1812, no one can doubt that this act of the purchaser entitled the petitioner to his freedom. Indeed, he is entitled to it, under the express provision of the Maryland law.

¹ 2 Stats. at Large, 194.

² 2 Ibid. 757.

The act of 1812 was designed to enable the owner of slaves in either of the two counties, within the District, to hire or employ them in the other. And this is the full purport of its provision on this subject. It clearly does not authorize a citizen of Washington to go to the county of Alexandria, purchase a slave, and bring him to Washington county for any purpose, much less for the purpose of sale, as found by the jury in this case. If this could be done, it would subvert the whole policy of the Maryland law, which was to prevent, except in specified cases, the importation of slaves into the State. And congress, by adopting the Maryland law, sanctioned its policy.

It is true that the two counties of this District are under the same political organization, and, in a certain sense, constitute one sovereignty. But this can have no effect upon the question under consideration. It depends exclusively upon the laws referred to. No views of policy or of supposed convenience can enter into the decision.

[*405] * The case of *The Bank of Alexandria v. Dyer*, 14 Pet. 141, has been relied on by the plaintiff in error, as showing that the counties of Washington and Alexandria, being united under the same government, cannot be considered as foreign to each other.

That was a case where the statute of limitation was pleaded to a suit in Washington county. The plaintiffs replied that they were citizens of Alexandria, &c., to which the defendant demurred. And on this state of the pleading the question was, whether the plaintiffs were beyond seas, within the meaning of the Maryland statute. The court held that they were not; "that the counties of Washington and Alexandria resemble different counties in the same State; and do not stand towards one another in the relations of distinct and separate governments."

The words "beyond seas," in the Maryland statute, were borrowed from the statute of James I. c. 21, and have generally been construed in this country not literally, but as meaning, "without the jurisdiction of the State." Now, in reference to this construction, the decision of the court was correct, but it can have no direct bearing upon the question under consideration. That the District of Columbia must be considered as exercising the same general jurisdiction in both counties, is undoubted; but the rights of its citizens are not governed by the same laws. The counties of Washington and Alexandria, excepting the modification made by the act of 1812, are as foreign to each other as regards the importation of slaves, as are the States of Virginia and Maryland. Such we understand to

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be the settled doctrine of the circuit court of this District. And this is no unsatisfactory evidence of what the law is. An acquiescence of many years in a course of decision involving private rights, should not be changed except upon the clearest ground of error.

There is a provision in the Maryland law prohibiting the owner of a slave from manumitting him, if he be over forty-five years of age; and this is urged by counsel as a reason why the petitioner in this case should not receive his liberty. He is now near sixty years of age; but how his rights are to be affected by a law which restrains the master, is not perceived. He claims to be wrongfully held in servitude, and the court think his claim is founded in law. Now, shall he be kept in servitude because his master, if he were disposed, could not manumit him? The law makes him free without the concurrence of his master. Slaves brought into the State of Maryland, in violation of the law, are declared to be free without reference to * their age. And the court cannot affix a con- [* 406] dition to this right of freedom, which the law does not authorize. Upon the whole, we are unanimously of opinion that the judgment of the circuit court should be affirmed, with costs.

19 H. 393.

JOHN RANDEL, JUN., Appellant, v. WILLIAM LINN BROWN; WILLIAM LINN BROWN, Appellant, v. JOHN RANDEL, JUN.

2 H. 406.

A lien upon certificates of stock cannot arise from a breach of trust.

THESE cases turned mainly on questions of fact; and the evidence upon which the court passed, and the relations of the parties upon which the question of lien depended, are detailed in the opinion of the court.

J. R. Ingersoll and C. Ingersoll, Jr., for Randel.

J. R. Tryon and Cadwallader, contra.

* MCKINLEY, J., delivered the opinion of the court. [* 416]

Randel filed his bill against Brown, on the chancery side of the circuit court of the United States for the eastern district of Pennsylvania. In which he states that, wishing to negotiate a loan of \$10,000, to be secured on certificates of the funded debt of the Chesapeake and Delaware Canal Company, he applied to Brown to aid him in the negotiation, with one of the banks of Philadelphia. And that it was agreed between them, that Randel should deliver to Brown

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two certificates of the funded debt of the canal company, for \$5,000 each, and execute to him a power of attorney, authorizing him to transfer the certificates to himself, or to any other person; and that Brown should, upon his own note, and the pledge of the certificates, if practicable, obtain a loan for Randel.

And in pursuance of this agreement, he executed the power, and delivered it and the certificates to Brown. That instead of obtaining a loan of money, as he had promised, Brown transferred the certificates to himself, and delivered them up to the canal company, and obtained new ones in his own name. That when Randel applied to Brown to know whether he had obtained the loan of \$10,000 for him, Brown replied that he had bad news for him: "I have not succeeded at the bank;" that the bank had a disposition to lend, but had not the means. That Randel then requested him to return the certificates of debt, which Brown refused to do; saying, he intended "to hold on to them" till Randel settled with him, or made him the present he had promised him.

Randel then put the following interrogatories to Brown: "Whether he did not receive the certificates and power of attorney in trust and confidence, in the manner and under the circumstances aforesaid; and whether he had any interest in the same, and was not, in holding the same, a mere trustee for the complainant, and did not refuse to deliver them to him; and whether he did not transfer said certificates to himself, on Monday, the 24th of October; and what circumstances occurred before the board of directors, or were communicated to him; and whether he did not inform the complainant that he had not succeeded at the bank, and give the complainant to believe that he had made application on that or the preceding day; and whether

the certificates were not transferred, by said Brown, to his [*417] own use *and not for the use of the complainant; and what use or disposition, if any, he had made thereof, and to whom, and for what consideration."

The answer denies all the material allegations of the bill, except it admits the receipt of the power of attorney and the certificates of debt. Brown then sets up, in his answer, a claim for services rendered to Randel, from the early part of the year 1831, till the 24th day of October, 1836, of various kinds, but particularly in attending to, and preparing for trial, a suit brought by Randel against the said canal company. And he alleges that Randel agreed to give him a reasonable compensation, for time to be expended in his service, in any event, and to pay his travelling and other expenses; and in the event of success in the suit, the additional compensation of two and a half per cent. on the amount that might be received thereon; and

that Randel finally recovered judgment, and received from the company the sum of \$230,000, in payment thereof.

But before the payment, and while it was uncertain whether any thing would be realized from the judgment, Brown states that, from exposure, in the service of Randel, he was taken sick, and it being uncertain whether he would recover or not, he applied to Randel for payment for the time then expended in his service, whereupon Randel caused to be transferred to the use of Brown \$2,000, part of said judgment. And a short time thereafter, about the month of September, 1834, Randel requested him to accept an order, drawn on him by Randel, in favor of a certain William H. Camac, for \$2,000, promising, at the same time, to place funds in his hands to meet its payment; which induced him to accept it. Brown refers to the order, in his answer, and which is as follows:—

“ Sir : Out of the sum of \$2,000 with interest due, and to become due thereon, which was assigned, at my request, by Samuel H. Hodson, to you, being one fifth part of the sum assigned by me to him, on trust, the 27th of January last, out of the judgment obtained by me against the Chesapeake and Delaware Canal Company, please to pay to William H. Camac, or order, the sum of \$2,000, out of the first moneys you obtain from said company on said account, or on account of tolls attached. If more than one year elapse before you obtain the whole of said sum of \$2,000, then pay to said Camac an interest of six per cent. on whatever balance may remain unpaid, after the expiration of said term of one year.” Brown accepted this order on the 26th of September, 1834.

* It is further charged in the answer, that on the 18th day [* 418] of April, 1836, for time expended in his service, from the date of the assignment of the said sum of \$2,000, down to that time, Randel gave to Brown a promissory note for \$300, payable ninety days after date. He then charges, that the two certificates of debt were delivered to him by Randel, on the 20th of October, 1836, for the purpose of paying himself, and the debt of \$2,000 to Camac. And at the same time Randel requested him to go to New Castle and reassign the part of said judgment which had been assigned to him as aforesaid; and that he, Randel, would then execute the power to Brown to enable him to transfer said two certificates of debt to himself. And accordingly, on the 22d of the same month, he at New Castle reassigned to Randel said sum of \$2,000, part of said judgment, and received from him the power of attorney, authorizing him to transfer said two certificates of debt, numbered 34 and 35, to himself, or any other person.

And in answer to the interrogatories in the bill, Brown says: “ That

he did not receive said certificates and power of attorney, in trust and confidence, in the manner and under the circumstances therein set forth, but absolutely, as an unqualified transfer, in payment of a debt due to him, by the complainant, and distinctly admitted by him, and to enable him, the respondent, to pay William H. Camac the amount of his, the respondent's acceptance, as before stated; and that said respondent has an absolute and unqualified interest in the certificates, to the whole amount of their principal and interest, and that he does not hold them as trustee for the complainant, nor any other person, but in his own right, and for his own use.

"And that he did refuse to deliver said certificates to the complainant, and did actually transfer said certificates to himself, on Monday, the 24th day of October last; and that he did not place said certificates before the directors of the Schuylkill Bank, on Monday, the 24th, or Tuesday, the 25th of October last. That touching the disposition your respondent has made of the said certificates, he says that they still stand in the name of your respondent, and were surrendered to this honorable court on the presentation of the complainant's bill of complaint." To the answer, the complainant filed a general replication. And, after time had been allowed the parties to take depositions, the court referred the case to three masters, with special instructions.

The masters, after a very thorough examination of the [* 419] evidence in * the cause, reported against the claim of Brown for separate compensation for time; but allowed him the two and a half per cent. commissions, claimed in his answer, amounting to \$5,659.64, as compensation for all services rendered. Both parties excepted to the report. Brown, to that part of it which disallowed his claim for separate compensation for time; and Randel excepted to that part which allowed to Brown two and a half per cent. on the amount of the judgment against the canal company.

The court overruled these and all other exceptions, confirmed the report of the masters, and rendered a decree in favor of Brown for the amount allowed by the masters, with interest from the 5th day of May, 1840, amounting together to the sum of \$6,136, to be paid out of these two certificates. From this decree both parties have appealed to this court.

The right of Brown to compensation for time, and his right to commissions on the amount of the judgment, are both involved in his assertion of the more general right, to be compensated, for all his services, out of these certificates. The principal questions, therefore, which we deem it necessary to examine, are, 1. Were the certificates delivered to Brown in payment of a debt to himself, and to

pay the debt to Camac? And, if they were not so delivered; then, 2. Had Brown such a legal or equitable interest in the certificates as authorized the decree of the court below? A just solution of these questions depends upon a proper examination of the evidence applicable to them, and the particular circumstances under which the witnesses acquired a knowledge of the facts they have deposed to.

Shortly after the bill was filed, and before Brown had filed his answer, he went to Delaware to ascertain what evidence he could obtain from persons having a knowledge of the services he had rendered to Randel. And from the inquiries he made of several of the witnesses, and the disclosures made to them, of the nature of his controversy with Randel, it is reasonable to suppose that he intended, at that time, to rest his defence upon the amount and value of his services only, and that he had not then thought of claiming the certificates, as having been delivered to him in payment of a debt due for those services. The depositions of four of those persons are found in the record. T. B. Roberts states, in his deposition, that Brown asked him what evidence he could give, as to the value of his services while with Randel, stating that the witness was aware of his having been for years doing business for him.

* The witness then says that Brown stated to him, "that [*420] the certificates had been put into his hands by Mr. Randel, to raise money upon them to pay certain debts of Randel's in Philadelphia; one of which he mentioned was to Mr. Camac; I think he stated himself under some obligation to have paid by Mr. Randel; and another debt to Mr. Charles Ingersoll; he did not state that the balance was for himself. He said he had exerted himself to negotiate the certificates to several persons, but had not succeeded;" "that Mr. Randel wished him to return the certificates to him, but he had refused to do so, until Mr. Randel settled certain debts he owed."

A. C. Gray, to whom Brown applied, for the purpose of getting his services as commissioner to take depositions for him, in this suit, says, Brown stated "that he had received a transfer of \$10,000 from Randel of the canal's debt, for the purpose of raising money; with which Mr. Randel wished to pay his debts. He stated also, that Mr. Randel owed him money for services which he had rendered him during the long litigation which had taken place between Randel and the canal company. In consequence of these things, he had determined to hold on to these certificates, as the only means to enforce the settlement of his claims."

Thomas Janvier, another of these witnesses, states, that when Brown applied to him to ascertain what testimony he could give in

this case, Brown stated that Randel had promised to pay him two and a half per cent. on the judgment against the canal company. The witness replied, that his testimony might operate against him, as the only claim he had ever heard him assert, was, that he intended to make Randel pay him \$2,000 for his services. Janvier then says: "That in the course of the conversation he gave me a history of the transaction, upon which this suit is founded; and told me that Randel had given him these certificates, which are now in controversy, for the purpose of negotiating a loan, to pay certain debts he had contracted—debts due to Mr. Camac, Mr. Charles Ingersoll, and himself; so far, I recollect positively. I am certain, from the information of Mr. Brown, that the certificates were given for the purpose of negotiating a loan, to enable Randel to pay certain creditors. I am certain he named Mr. Camac, Mr. C. Ingersoll, and himself as creditors."

Cornelius D. Blaney, the fourth witness, says, he does not recollect that Brown stated how the certificates came into his hands; in other respects his testimony is, substantially, the same as that of [*421] the other *three witnesses; and it appears that he was present at the conversation between Brown and the witness, Roberts.

After collating this evidence with clearness and ability, the masters proceed to say: "It is remarkable that to none of these persons did the respondent state the fact, that he had transferred these certificates into his own name; it is remarkable also, that if, at that time, he did entertain the same clear and positive conceptions of his rights, which is set forth in the answer, he did not simply and plainly state that right, and say, "they (the certificates) were given in payment, or part payment of my own claim, and of my liability to Mr. Camac." We cannot close our minds to the force of the testimony of these four persons. It has been ably urged that evidence gathered from the declarations of a party is unsafe, peculiarly liable to the effects of misapprehension, of inattention, of defect, of recollection; that a word omitted, or displaced, may change the whole character of the declaration. We have felt the force of the argument, but it does not prevail against the influence of the concurring testimony of four intelligent and respectable men, giving a very uniform account of the respondent's representation of his own case; and, in relation to the question of trust, giving such a narration as to lead to one and the same result. We have observed, too, that it is the same species of evidence upon which the respondent asserts his alleged contract with the complainant, which contract he states in his answer, in the words or declarations of the complainant, alleged to have been uttered to

himself, at a time much less recent than his own declarations to the witnesses."

"The testimony of these witnesses, then, establishes, in our opinion, and accordingly we find, and so report:—

"1. That the delivery of the certificates by the complainant to the respondent was not absolute, but upon a trust.

"2. That the trust was to raise money.

"3. That of the money so to be raised, part was to be paid to Mr. Camac; and that, as to this part, the respondent had a direct interest in the execution of the trust, in consequence of his acceptance of the draft drawn in favor of Mr. Camac, referred to in the answer, and of his retransfer of the interest in the judgment upon which the draft was drawn.

"4. That another portion of the money so to be raised, was to be paid to Mr. C. Ingersoll.

"5. That no express appropriation of the balance, or any part * thereof, was made at the time by the complainant in [*422] favor of the respondent."

We concur entirely with the masters in their reasoning, and in the conclusions they have arrived at, upon this testimony, except as to the supposed interest of Brown in the execution of the trust, mentioned in the third specification. Upon that we shall have occasion to comment, in another part of this opinion. This evidence sustains the allegations of the bill, fully, and contradicts the answer, as to the objects and purposes for which the two certificates were delivered by Randel to Brown. There is, therefore, no further pretence to say that Brown received the certificates in payment of a debt to himself, and for the purpose of paying the debt to Camac. And this evidence establishes another material fact in this case; and that is, that Brown had no interest or property in the certificates before they were delivered to him by Randel; and whether he acquired any in them afterwards, leads us to the consideration of the second question. Had Brown such an equitable interest in the certificates as authorized the decree of the court below?

In the third specification before referred to, the masters reported that Brown had a direct interest in the certificates, on account of his acceptance of Randel's order in favor of Camac, and his having relinquished to Randel his interest in the judgment. It is difficult to ascertain upon what ground it was assumed, at the date of the report, that Brown had an interest in these certificates. The order was drawn upon a special and contingent fund, which might never be received; and until received, Brown was not liable to pay. There is no proof in the cause that can be relied upon, to show on what con-

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sideration the reassignment was made; unless the statements in Brown's answer are to be received as evidence. When the answers of the defendant are directly responsive to the allegations of the bill, they amount to positive proof. But in this case there is no allegation in the bill, in relation to this assignment or reassignment. Brown, in giving a history of the transactions between him and Randel, sets up in his answer this sum of \$2,000, as having been assigned to him in part payment of his services; and in another part of his answer, he states that, upon receiving the certificates and power of attorney, at the request of Randel, he reassigned his interest in the judgment to him.

This being clearly matter in avoidance, it is entitled to no more consideration, as evidence, than are the allegations of the [* 423] bill. There * is no evidence, therefore, that the reassignment was made in consideration of the delivery of the certificates by Randel to Brown. But there is strong presumptive evidence that it was made in consideration of the payment of the order to Camac by Randel, or of his promise to Brown, that he would pay it; for it appears by the report of the masters, that it was admitted by the parties, and the counsel on both sides, that the amount of the order had been paid by Randel to Camac after the commencement of this suit.

But if Brown had even acquired a valid lien on the certificates, on account of the acceptance of the order, and the reassignment of his interest in the judgment, the payment of the order by Randel, pending the suit, extinguished the lien, and no decree ought, on account of this supposed lien, to have been rendered in favor of Brown; for it is the rights of the parties, at the time the decree is rendered, that ought to govern the court in rendering the decree. In either aspect of the case, however, Brown's right to these certificates is reduced to naked possession; and, since his refusal to restore them to Randel, his possession has been fraudulent.

It has been contended, by Brown's counsel, that, as the masters have reported that a large amount was due from Randel to Brown, and that Randel had parted with all the rest of his certificates of funded debt; that, therefore, Brown had a right to payment out of the certificates in controversy in this case. In support of this proposition, they relied on the case of Handy and Harding, 11 Wheat. 103.

The bill, in that case, stated that Wheaton, under whom the complainants claimed, as heirs at law, about the year 1802, began to exhibit symptoms indicating loss of intellect, and soon became incompetent to the management of his estate. Under these circumstances, it was agreed among his children that Handy, who had married his daughter, should endeavor to take his estate out of his hands, and

preserve it for the benefit of his heirs at law. That it was agreed that Wheaton should be prevailed on to convey the real property to Handy, for a nominal consideration, who should forthwith execute an instrument of writing declaring that he took and held the same in trust. 1. To provide a decent support for the grantor, during his life; and after a full remuneration for his expenses and trouble, in that respect, to hold the residue of the estate for the benefit of the heirs at law. Handy procured the conveyance from Wheaton, and entered upon and possessed the property till his death, but refused to execute the declaration of trust.

* The bill then prayed for an account; and that a decree [* 424] might be rendered, exonerating the estate from the deed to Handy, after satisfying his just claims, &c.

The answer denied that Wheaton was incapable of conveying, when the deed was made. It denied also that the defendant purchased as a trustee; and averred, that he was a purchaser for a full and valuable consideration.

The circuit court decreed that the deed should be set aside; and that an account should be taken of the receipts and disbursements of Handy, and that he should be credited for all advances made, and charges incurred for the maintenance of Wheaton during his life, and for repairs and improvements made on the estate. This part of the decree was affirmed by the supreme court. Handy's possession of the estate was consistent with the intention of the parties; the advances made and charges incurred, for the maintenance of Wheaton, were according to their agreement; and the repairs and improvements made, preserved the estate, and enhanced its value. Thus far Handy executed the trust fairly, and thereby acquired a lien on the funds in his hands, arising from the rents and profits; nor were these acts tainted by his subsequent fraud, in refusing to execute other parts of the trust; and besides, the complainants, in their prayer for relief, authorized the court to allow Handy his just claims against the estate. This case does not, therefore, give any support to the proposition assumed by the counsel of Brown.

There is no parallel between these cases, as a brief comparison will show. Brown's possession of the certificates, after refusing to restore them to Randel, was not only fraudulent, but wholly inconsistent with the contract with Randel; and in violation of the trust upon which he received them. And Randel, so far from authorizing the court to allow Brown's claim out of the certificates, stated positively in his bill, that he owed him nothing. The proof shows conclusively that Brown had neither property nor interest in the certificates, before they were delivered to him by Randel. Unless he can

show, therefore, that he has a lien on them, he can neither hold them as security for the payment of the claims set up in his answer, nor is he entitled to payment out of them, at law or in equity. To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed; and no person can acquire a lien, founded upon his own illegal or fraudulent act, or breach of duty; nor can a

lien arise, where, from the nature of the contract between [*425] the parties, it *would be inconsistent with the express terms, or the clear intent of the contract. For example, if the goods were deposited in the possession of the party for a particular purpose, inconsistent with the notion of a lien, as to hold them or the proceeds for the owner, or a third person. Story on Agency, 73, 74, 75; Lamprier v. Pasley, 2 Term R. 485; Cranston v. The Philadelphia Insurance Company, 5 Bin. 538; Turno v. Bethune, 2 Desau. 285; Jarvis v. Rogers, 15 Mass. 389, 395; Weymouth v. Bowyer, 1 Vesey, Jun. 416; Taylor v. Robinson, 8 Taunt. 648; Gray v. Wilson, 9 Watts, 512; Madden v. Kempster, 1 Camp. 12; Crockford v. Winter, 1 Camp. 124.

In the case of Madden v. Kempster, Lord Ellenborough said: "The defendant being under an acceptance for Captain Hart, whose agent he had been, might have retained a sum of money to answer that acceptance. But the plaintiff is entitled to recover this sum of money, the defendant having obtained it by misrepresentation. He mentioned nothing of the acceptance, he obtained it as a balance when no balance was due to him. He cannot, therefore, set up the lien to which he might otherwise have been entitled." Lord Ellenborough held the same doctrine in the case of Crockford v. Winter; and the same doctrine was held in Taylor v. Robinson, 8 Taunt. 648.

In this case of Madden v. Kempster, it is admitted that Kempster would have had a good lien on the £60 if he had obtained the money honestly, and in the course of business. But having obtained it by misrepresentation, he was not permitted to set up the lien, to which he might otherwise have been entitled. How, then, can Brown set up a lien on these certificates, holding possession of them as he does, by just as gross a fraud? There is no aspect in which the question can be placed, consistently with the evidence and the authorities above cited, that will justify the decree in his favor. To permit this decree to stand would be to sanctify fraud, and to allow Brown, by taking advantage of his own wrong, to obtain compensation for his services in a court of chancery, upon a case purely cognizable in a court of law; the decree of the circuit court is, therefore, reversed, and the cause is remanded to the circuit court with directions to enter a decree for the plaintiff, conformably to this opinion, and that the defendant pay costs in both courts.

**ROBERT BARNWELL RHETT, Plaintiff in Error, v. ROBERT F. POE,
Cashier of the Bank of Augusta, Defendant.**

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A drawer had funds in the hands of the acceptor when the acceptance was made, but withdrew them, under an agreement to provide other funds before the maturity of the bill; if the drawer failed to keep this agreement he was not entitled to notice of the dishonor of the bill, for he had no right to expect it would be paid.

When the facts, upon which the question of due diligence depends, are ascertained, whether due diligence was used, is a question of law.

If the holder of a bill is unable, by due diligence, to ascertain the residence of the drawer, he is excused from giving him notice of the dishonor of the bill.

If the drawer and acceptor are copartners in the transaction out of which the bill grew, the drawer is not entitled to notice.

A refusal to give an instruction not applicable to the evidence, is not error.

An indorser of a note, intended to guarantee a bill of exchange, cannot avail himself of want of notice to the drawer of the bill.

ERROR to the circuit court of the United States for the district of South Carolina.

The action was brought by Poe, who was cashier of the Bank of Augusta, against Rhett, as indorser of a promissory note, dated May 9, 1837, for \$8,000, signed by B. R. Smith, payable to W. E. Haskell, or order, in sixty days from its date, and indorsed by the payee and Rhett. It appeared that this note was given to the bank as collateral security for a bill drawn by one Timberlake on Smith for \$8,000, payable at the same time as the note. Both the note and bill were dishonored at maturity; and though due notice of the dishonor of the note was given to the indorsers thereon, one defence set up was, that due diligence had not been used to give notice to the drawer of the bill for which the note stood as collateral security.

The plaintiff offered evidence tending to show that when the notary protested the bill for non-payment, at Charleston, he did not know where the drawer, Timberlake, lived, and that he sent a notice for him to the Bank of Augusta, as was usual; that it was the duty of the discount clerk of the bank to serve such notices, and he believed, if Timberlake had been in Augusta, the notice would have been served on him; that Timberlake lived in a boarding-house while in Augusta, and was insolvent at the maturity of the bill. There was other evidence tending to show that Timberlake had left Augusta before the maturity of the bill, and left no agent there; that he had desired the postmaster there to forward his letters to him, and that he received several after the maturity of the bill, up to which time, and for three months subsequently, he had a box at the post-office in Augusta.

Two sets of instructions, the first consisting of two, and the

second of five prayers, were asked for by the defendant, as follows:—

[* 460] *1. That by omission to inquire for the residence of Timberlake, or to send notice after him, the plaintiff has lost his right of action against him as drawer of the bill for \$8,000.

2. That if the jury find that the note was given as collateral security for the bill drawn by Timberlake, and that Timberlake is discharged, then the plaintiff cannot recover against the defendant on the note sued upon.

The second set of instructions prayed for, the court refused to give, with the exception of the fourth, and gave its own instructions to the jury. Those prayed for were as follows:—

[* 461] *1. The parties having shown that Timberlake had drawn upon Smith four bills, amounting in all to \$21,500, which Smith had accepted, and had, at the time of the acceptance of the said bills, \$10,000 in hand, received of Timberlake, to meet those bills, the defendant prayed the court to instruct the jury, that if the evidence was believed, then Timberlake had funds in the hands of Smith, and was entitled to notice.

2. The defendant having shown that Timberlake resided in New York, and came habitually, between the months of October and January, to Augusta, and resided in Augusta during the winter and spring, and that Timberlake left Augusta on the 30th June, 1837, and that the notice of non-payment of the draft was forwarded by the notary in Charleston, to the plaintiff, on the 11th July, 1837, and nothing was shown to prove that the plaintiff had made any inquiry after Timberlake, or endeavored to give him notice.

The defendant prayed the court to instruct the jury that the plaintiff had not used due diligence to give the drawer notice.

3. And inasmuch as evidence had been given, that the bills drawn by Timberlake on Smith were drawn for purchases of cotton or stock, on the joint account of Smith and Timberlake, and Timberlake had diverted the property purchased on joint account to his own use, and was therefore bound to provide for the bills which fell due in May, to the amount of \$13,500, and had not done so; the defendant prayed the court to instruct the jury, that the default of Timberlake to take up the bills for \$13,500, did not excuse the want of notice to make him liable on the bill for \$8,000.

4. And the defendant prayed the court to instruct the jury, that if Timberlake had effects at any time between the drawing and the maturity of the said bill, in the hands of Smith, he was entitled to notice.

5. The defendant prayed the court to instruct the jury, that the

insolvency of the acceptor and drawer, before the maturity of the bill, did not excuse the holder from giving notice of non-payment to the drawer.

On the first instruction asked, the court instructed the jury, that if they believed, from the evidence, that Timberlake had in the hands of Smith, when Smith accepted the bill for \$8,000, \$10,000, that Timberlake was entitled * to notice of the dishonor of [* 462] the bill from the holder. But if the jury also believe from the evidence that the \$10,000, in the hands of Smith, was a fund raised upon Smith's letter of credit to Timberlake, and was to be applied to the payment of purchases on joint account, and had been so applied, and that there was an arrangement afterwards between Timberlake and Smith in respect to all the bills drawn by Timberlake, amounting to \$21,500; that Timberlake was to put Smith in funds to pay bills to the amount of \$13,500 of the \$21,500, which were to become due before the bill of \$8,000 became due, and that on Timberlake doing so, Smith was to pay the \$8,000 bill; and that Timberlake did not put Smith in funds to pay the \$13,500, and that the same were protested, of which Timberlake had notice; then, that Timberlake had no right to notice of the non-payment of the \$8,000 bill from the holder.

On the second instruction asked, the court instructed the jury, that if they believe from the evidence that Timberlake resided in New York, and was a sojourner in Augusta, from time to time, as stated in the instruction asked, that then, as drawer of the bill, he was entitled to notice of its dishonor; but if the jury believe from the evidence, though he may have resided in New York, that he had made Augusta his residence since the fall of 1834 or 1835, and that he had removed from Augusta, and out of the State of Georgia, after the bill for \$8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill.

On the third instruction asked, the court instructed the jury that if they believe from the evidence that the bills drawn by Timberlake upon Smith were drawn for purchases of cotton or stock on the joint account of Smith and Timberlake, and that Timberlake had diverted the property purchased on joint account to his own use, and that after promising Smith, the acceptor, to take up the bills to the amount of \$13,500, he had failed to do so, and had not supplied Smith with money to take up the bills for \$13,500, after the same were dishonored, up to the time when the \$8,000 draft became due, and that there was an arrangement between Timberlake and Smith, after the \$8,000 bill was accepted, that Timberlake was to put Smith in funds to take up the drafts for \$13,500, which had been dishonored, and did

not do so, that Timberlake was not entitled to notice of the dishonor of the bill for \$8,000.

To the fourth instruction asked, the court instructed the [*463] jury, if * they believe from the evidence that Timberlake had effects in the hands of Smith at any time between the drawing of the bill and the maturity of the said bill, that he was, as drawer, entitled to notice.

To the fifth instruction asked, the court instructed the jury that the insolvency of the drawer and the acceptor, before the maturity of the bill, did not excuse the holder of the bill from giving notice of non-payment to the drawer. But the court further instructed the jury, that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for a purchase on joint account, or a transaction in which they were partners, and that the property so purchased had been diverted by the drawer to his own use, and that the payment of all the bills had been the subject of private arrangement between the acceptor and the drawer, that then the holder was excused from giving notice of the non-payment of the bill for \$8,000.

The jury found a verdict for the plaintiff for \$8,000, with interest from the 11th July, 1837.

Coxe and Legaré, (attorney-general,) for the plaintiff in error.

Wilde and Hunt, for the defendant.

[*478] * DANIEL, J., delivered the opinion of the court.

The instrument upon which this suit was instituted in the circuit court was, as the foregoing statement evinces, in form simply a common promissory note, signed by Benjamin R. Smith, made payable to William E. Haskell, indorsed by Haskell to Robert Barnwell Smith, *alias* Robert Barnwell Rhett, and by this last individual to Robert F. Poe, cashier of the Bank of Augusta, the plaintiff in the action. Such being the nature of the instrument, and it appearing that the formalities of demand at its maturity, and notice to the indorsers have been regularly fulfilled by the holder, a question as to the justice of a recovery by the latter could scarcely be suggested, if the rights and obligations of the several parties shall be viewed as dependent upon their relation to the note itself considered as a distinct and separate transaction. Such, however, is not precisely the attitude of the parties to this controversy. It is in proof that there was held by the plaintiff below, beside this note, a draft for \$8,000, drawn by Timberlake on the 6th of May, 1837, at sixty days, in favor

of the plaintiff, on Benjamin R. Smith, and accepted by Smith; and further, that upon the note was written, by the plaintiff's agent, a memorandum in the following words: "This note is collateral security for the payment of the annexed draft of D. Timberlake on B. R. Smith of \$8,000." Upon the effect of both these instruments, as constituting parts of one transaction, the questions propounded to the circuit court, and brought hither for review, have arisen. The further proofs contained in this record will [* 479] be adverted to in the progress of this opinion, as notice of them shall become necessary to explain the instructions prayed for, and those given by the circuit court on the trial of this cause. The second series of instructions, embracing a more extended and varied survey of the evidence than is contained in that preceding it, will be first considered. It is to the first, second, third, and fifth instructions of this second series that exceptions are taken. To the first proposition affirmed by the court in this first instruction, it is difficult to imagine any just ground of objection on the part of the defendant below, as that proposition concedes almost in terms the prayer of that defendant. To the second branch of this instruction it is not perceived that any valid objection can be sustained; for, although it might have been true that at the date of acceptance of Timberlake's draft on Smith for \$8,000, the latter had been in possession of \$10,000 placed in his hands by Timberlake, it would not follow under the circumstances proved, or under those assumed in the instruction, that Timberlake, as the drawer of that draft, was entitled to notice. If, as the instruction supposes, the acceptances for \$21,500, which Smith had come under for Timberlake, were drawn for the accommodation of the latter, upon the faith of funds to be furnished by him for their payment; that the \$10,000 had been furnished by Timberlake in part for that purpose, but had been withdrawn by him for his own uses prior to the maturity of the draft for \$8,000—that he should have intercepted before the maturity of the draft all the funds against which he knew the acceptances of Smith were drawn, and that he, the drawer, and Smith, the acceptor, had, before such maturity, become notoriously insolvent, under such a predicament the law would not impose the requirement of notice to the drawer upon the holder. No useful or reasonable end could be answered by such a requisition. Where a drawer has no right to expect the payment of a bill by the acceptor, he has no claim to notice of non-payment. This is ruled in the following cases: *Sharp v. Baily*, 9 Barn. & Cress. 44; 4 Mann. & Ryl. 18; *Bickerdike v. Bollman*, 1 T. Rep. 405; *Brown v. Maffey*, 15 East, 221; *Goodall v. Dolley*, 1 T. Rep. 712; *Legge v. Thorpe*, 12 East, 171. If the \$1,000 said to have been in

the hands of Smith were, by the agreement or understanding between Smith and Timberlake, to be applied in payment of joint claims against them, and falling due before the draft for \$8,000, and had been so applied, it had answered the sole object for which it [* 480] had been raised, and could not in the * apprehension of these parties constitute a fund against which the draft of \$8,000 subsequently to become due was drawn. Those \$10,000 were gone, were appropriated by these parties themselves. Then if, after this appropriation, there was, as this instruction assumes, an arrangement between Timberlake and Smith in respect to the bills drawn by Timberlake to the amount of \$21,500, that he was to put Smith in funds sufficient to pay \$13,500 of the amount just mentioned, which were to become payable before the \$8,000 draft, and that on Timberlake's supplying those funds, Smith was to pay the \$8,000 draft, and Timberlake failed to put Smith in funds to take up the \$13,500, and that the drafts for the same were protested, of which Timberlake had notice, he, Timberlake, could have no claim to notice of non-payment of the draft for \$8,000. There could be no reason for such a notice from the holder of the draft. Timberlake could have had no right to calculate on the payment of this draft; on the contrary, he was bound to infer its dishonor. He knew that payment of the draft for \$8,000 was dependent upon a condition to be performed by himself, and he was obliged to know from the notice of the dishonor of all his bills, that he had not performed that condition, and had thereby intercepted the very funds from which the acceptances by Smith were to be met. He, therefore, *quoad* this draft, had never any funds in the hands of Smith, and consequently never had any claim to notice of non-payment from the holder.

The case of *Claridge v. Dalton*, in 4 Maule & Selw. 226, is strongly illustrative of the principle here laid down. That was a case in which the drawer had supplied the drawee with goods which were still not paid for. To this extent, then, the former unquestionably had funds in the hands of the latter; but on the day of payment of the bill the credit upon which the goods were sold had not expired, and the court thereupon unanimously ruled that *quoad* the obligations of the parties arising upon these transactions, the drawer must be understood as having no effects in the hands of the drawee, and, therefore, not entitled to notice. The second instruction affirms, in the first place, what must be admitted by all, and what is not understood to be matter of contest here, namely: that whenever a party to a bill or note is entitled to notice, such notice, if not given him in person, must be by a timely effort to convey it through the regular or usual and recognized channels of communication with the party or his agent, or

with his known residence or place of business. It is to so much of this instruction as is applicable to what may amount to *a dispensation from the regular or ordinary modes of [*481] affecting parties with notice, that objection is made; to that portion in which the court charged the jury that, if they believed from the evidence that, although Timberlake may have resided in New York, that he had, since the autumn of 1834 or 1835, made Augusta his residence, and that he had removed from Augusta, and out of the State of Georgia, after the bill for \$8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill. It is not considered by this court, that this charge, in any correct acceptation of it, trenches upon the legitimate province of the jury, or transcends the just limits of the authority of the court, or contravenes any established doctrine of the law. 'T is a doctrine generally received, one which is recognized by this court in the case of *The Bank of Columbia v. Lawrence*, 1 Pet. 578, that, whenever the facts upon which the question of due diligence arises, are ascertained and undisputed, due diligence becomes a question of law. See also *The Bank of Utica v. Bender*, 21 Wendell, 643. In the case before us, every fact and circumstance in the evidence, which was to determine the residence of the drawer in Augusta, or his abandonment of that residence, or his removal from the State of Georgia; the unsettled and vagrant character of his after-life, the fruitless inquiries by the notary to find out his residence, the notoriety of his having neither domicile nor place of business in Georgia, the effort to follow him with notice of dishonor of his draft, were all submitted to the jury to be weighed by them. The charge of the court should be interpreted with reference to the testimony which is shown to have preceded it, upon which, in truth, it was prayed; with reference, also, to the reasonable conclusions which that testimony tended obviously to establish. Interpreted by this rule, it amounts to this, and this only, a declaration to the jury that if the evidence satisfied them of the residence of Timberlake in Augusta at the time of drawing the draft, of the certainty and notoriety of his having abandoned that residence and the entire State before its maturity, leaving behind him no knowledge of any place, either of his residence or for the transaction of his business, satisfied them also of the real but unavailing effort of the notary who protested the draft to discover his whereabouts, they ought to infer that due diligence had been practised by the holder of the draft. In the case of an indorser, with respect to whom greatest strictness is always exacted, it has been ruled that the holder of a bill is excused for not giving regular notice of dishonor *to the indorser, [*482]

of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. Thus, Lord Ellenborough, in *Bateman v. Joseph*, 2 Campb. 462, remarks: "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice within the custom of merchants." See, to the same effect, 12 East, 433; *Baldwin v. Richardson et al.* 1 Barn. & Cress. 245; *Beveridge v. Burgis*, 3 Camp. 262. It has been held, in Massachusetts, that, where the maker of a promissory note had absconded before the day of payment, presentment and demand could not be required of the holder in order to charge the indorser: opinion of Parsons, C. J., in *Putnam v. Sullivan*, 4 Mass. 53. In *Duncan v. McCullough*, 4 Serg. & Rawle, 480, it was ruled that, if the maker of a promissory note is not to be found when the note becomes due, demand on him for payment is not necessary to charge the indorser, if due diligence is shown in endeavoring to make a demand. *Hartford Bank v. Stedman*, 3 Conn. 489, where the holder of a bill, who was ignorant of the indorser's residence, sent the notice to A, who was acquainted with it, requesting him to add to the direction the indorser's residence, it was held that reasonable diligence had been used. The measures adopted in this case by the holder of Timberlake's draft, when viewed in connection with the condition and conduct of the drawer himself, appear to come fully up to the requirement of the authorities above cited; and, therefore, in the judgment of this court, affect him with all the consequences of notice, supposing this now to be a substantial proceeding upon the draft itself.

Next and last in the order of exception, is the fifth instruction. The first position in this is given almost literally in the terms of the prayer. The court proceeds further to charge that, if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for purchases on joint account, or a transaction in which they were partners, and the property so purchased had been diverted by the drawer to his own use, and that the payment of the bills had been the subject of private arrangement between the acceptor and drawer, that then the holder was excused from [* 483] giving notice of the * non-payment of the bill for \$8,000.

With respect to the exception taken to this instruction, all that seems requisite to dispose of it, is the remark that, if the drawer

of the bill was in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill, by the holder to the drawer, need not have been given. The knowledge of the one partner was the knowledge of the other, and notice to the one notice to the other. Authorities upon this point need not be accumulated; we cite upon it *Porthouse v. Parker*, 1 Campb. 82, where Lord Ellenborough remarks, speaking of the dishonor of the bill in that case, "as this must necessarily have been known to one of them, the knowledge of one was the knowledge of all;" also, *Bignold v. Waterhouse*, 1 M. & Selw. 259; *Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 Johns. 176. Recurring now to the first series of instructions prayed for, we will consider how far the two propositions presented by them were warranted by the correct principles upon which the opinion of the courts may be invoked; and how far the court was justifiable in rejecting the propositions in question, upon the ground, either of want of connection with any particular state or progress of the evidence, or of support and justification as derived from the entire testimony in the cause. It is a settled rule of judicial procedure, that the courts will never lay down as instructions to a jury, general or abstract positions, such as are not immediately connected with and applicable to the facts of a cause, but require that every prayer for an instruction should be preceded by and based upon a statement of facts, upon which the questions of law naturally and properly arise. It is equally certain that the courts will not, upon a view of the testimony, which is partial or imperfect, give an instruction which the entire evidence in a cause, when developed, would forbid. Tested by these rules, the two instructions prayed for in the first series, are deemed to be improper, they are accompanied with no statement of the testimony as their proper and immediate foundation; they are bottomed exclusively upon assumption, and such assumption, too, as the testimony taken altogether, is believed to contradict. The court, therefore, properly refused these instructions; for this refusal it was by no means necessary that the causes should be assigned by the court, *in extenso*; these are to be seen in the character of the instructions themselves, and in the testimony upon the record. This court has thus considered and disposed of the several prayers for instruction in this cause, and of the rulings of the circuit court thereupon. * Whilst this procedure has been proper with [* 484] the view of ascertaining how far the rights of the parties have been affected by the several questions presented and adjudged in the circuit court, it is our opinion that the true merits of this controversy are to be found within a much more limited and obvious

range of inquiry than that which has been opened by these questions. The note on which the action below was instituted, was given as a guarantee for the solvency of the parties to the bill for \$8,000, drawn in favor of the plaintiff, and for its punctual payment at maturity. Such being the character and purposes of the note, was it necessary, in order to authorize a recovery upon it, that every formality, all that strictness should have been observed in reference to the bill intended to be guaranteed, which it is conceded are indispensable to maintain an action upon a mercantile paper against a party upon that paper? It is contended that a guarantee is an insurance of the punctual payment of the paper guaranteed; is a condition and a material consideration on which this paper is received, and therefore that a failure in punctual payment at maturity is a forfeiture of such insurance on condition, rendering the obligation of the guarantor absolute from the period of the failure. Whether this proposition can or cannot be maintained to the extent here stated, the authorities concur in making a distinction between actions upon a bill or note, and actions against a party who has guaranteed such bill or note by a separate contract. In the former instances, notice, in order to charge the drawer or indorser, is, with very few established exceptions, uniformly required; in the latter, the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course. In *Warrington v. Furber*, 8 East, 242, where the guarantee was not by indorsement of the paper sued upon, and the action was upon the contract, Lord Ellenborough said, "that the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action on the bill itself, where, by the law merchant, a demand and a refusal by the acceptor ought to be proved to charge any other party on the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees who insure as it were the solvency of the principal; and if he becomes bankrupt and notoriously insolvent, it is the same thing as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him." Le Blanc, J., says, in the same case: "There is no need of the same proof to charge a guarantee as there [* 485] is a party whose name is on a bill of exchange; for * it is sufficient, as against the former, to show that the holder could not have obtained the money by making demand of it." The same doctrine may be found in *Philips v. Astling et al.* 2 Taunt. 206. So, too, Lord Eldon, in the case of *Wright v. Simpson*, 6 Ves. 732, expresses himself in terms which show his clear understanding of the position of a collateral guarantee or surety; his language is: "As to the case of principal and surety, in general cases, I never understood

that, as between the obligee and the surety, there was an obligation to active diligence against the principal, but the surety is a guarantee, and it is his business to see, whether the principal pays, and not that of the creditor." The case of *Gibbs v. Cannon*, 9 Serg. & Rawle, 198, was an action against a guarantor who was not a party on the note, upon his separate contract. The supreme court of Pennsylvania decided in this case that, provided the drawer and indorser of the note were solvent at the maturity of the note, notice of non-payment should be given to the guarantor, and that the latter, under such circumstances, may avail himself of the want of notice of non-payment, but it places the burden of proving solvency, and of injury flowing from want of notice upon the guarantor. The last case mentioned on this point, and one which seems to be conclusive upon it, is that of *Reynolds v. Douglass et al.* 12 Pet. 497, in which the court establish these propositions.

1. That the guarantor of a promissory note, whose name does not appear upon the note, is bound without notice, where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of non-payment.

2. If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained. Tried by the principles ruled in the authorities above cited, and especially by that from this court, in 12 Pet., it would seem that this case should admit of neither doubt nor hesitancy. The note on which the action was brought, was given as a guarantee for the payment of the bill for \$8,000, as is proved and, indeed, admitted on all hands. It is the distinct and substantive agreement by which the guarantee of the bill was undertaken. It is established by various and uncontradicted facts and circumstances in the cause, and finally by the solemn admissions of Timberlake, the drawer, and Smith, the acceptor of the bill, both of whom have testified in the cause that, at the maturity of the * bill, they were both utterly insolvent; that [*486] Timberlake was probably so before the commencement of these transactions; and that Smith, before the maturity of the bill, had made an assignment of every thing he had claim to, for the benefit of others, and, amongst the creditors named in that assignment, providing for the plaintiff in error as ranking high amongst the preferred class.

Under such circumstances, to have required notice of the dishonor of the bill, would have been a vain and unreasonable act, such as the law cannot be presumed to exact of any person. Upon a review of the whole case, we think that the judgment of the circuit court should be affirmed.

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SUSAN LAWRENCE, Plaintiff in Error, v. ROBERT MCCALMONT, HUGH MCCALMONT, and WILLIAM JOHNSON NEWELL, Defendants.

2 H. 426.

A letter of guarantee is to receive a fair and reasonable interpretation, so as to obtain its objects, and not a nice or technical construction.

A letter, held to be a continuing guarantee, and to import a future consideration.

If a letter of guarantee acknowledge the receipt of one dollar, as a consideration, the guarantor is estopped to deny the existence of that consideration, and it is sufficient to support the promise.

It is a question of fact whether the guarantor had reasonable notice of the failure of the principal debtor to pay.

If a debtor indorse notes to his creditor as collateral security, the creditor does not make them his own by failing to give notice to the debtor of non-payment, according to the requirements of the commercial law; it is merely a question of due diligence, on the part of the creditor, to obtain payment.

THE case is stated in the opinion of the court.

Wood, for the plaintiff.

Lord and *Sergeant*, contra.

[* 445] * STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court for the southern district of New York.

On the 21st of November, 1838, J. and A. Lawrence obtained from the agents (Messrs. Gihon and Co.) at New York, of McCalmont, Brothers, and Co., of London, the following letter of credit:—

New York, 21st November, 1838.

Messrs. McCalmont, Brothers, and Co., London:—

Gent.: We have granted to Messrs. J. and A. Lawrence of this city, a credit with you of £10,000, say ten thousand pounds sterling, to be availed of within six months from this time, in such drafts as they may direct, at four months' date, against actual shipments of goods for their account, and coming to their address; said goods to be forwarded through you or your agents.

The above credit is granted under their engagement to cover your acceptances before maturity, by direct remittances from this country of approved sixty day bills—seconds of exchange to be banded to us for transmission to you. You are to charge one per cent. commission on the amount accepted, and to keep the account at five per cent. interest per annum.

We are, gents., your ob. st.,

JOHN GIHON AND CO.

The letter of credit was delivered on Mr. Lawrence's proposal of his mother's (the plaintiff in error's) security for the credit. On the

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17th of December, 1838, Mrs. Lawrence gave the following guarantee :

Messrs. McCalmont, Brothers, and Co., London :

Gent. : In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of one dollar *paid me by yourselves, receipt of which I hereby [*446] acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request; together with your charges, and I guarantee you from all payments and damages by reason of their default.

You are to consider this a standing and continuing guarantee without the necessity of your apprising me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary.

Yours, respectfully,

SUSAN LAWRENCE.

Under these documents, McCalmont, Brothers, and Co. made the stipulated advances, which were repaid; and on the transactions included within the six months from 21st of November, 1838, nothing has been claimed by the London house. About the expiration of the six months, Mr. Lawrence (one of the firm of J. and A. Lawrence) at New York, called on the agents of McCalmont, Brothers, and Co., and asked if it was agreeable for the agents to continue the credit for £10,000. The reply of one of the agents was, that there was no objection to continue it on the same terms as before, stating that it was to be on the mother's guarantee attached to the previous credit. Mr. Lawrence then answered, that he did not expect it on any other terms, or without the guarantee. The agent then wished time to examine whether the guarantee was for a particular credit, or was a continuing guarantee; and having referred to the letter of guarantee, they drew up and delivered to Mr. Lawrence a second letter of credit, (Mr. Lawrence and the agents both agreeing that it was a continuing guarantee, and as such no new letter was needed from the mother.) The second letter of credit, dated on 12th of June, 1839, was as follows :—

New York, June 12, 1839.

Messrs. McCalmont, Brothers, and Co., London :—

Gent. : With reference to our letter of 21st November last, opening a credit on your good selves, favor Messrs. J. and A. Lawrence for £10,000, to be drawn within six months from that date, and

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which expired by limitation last month. We hereby renew the same for a like period from the date hereof, and under the same [* 447] stipulations, *with this proviso, that the bills be drawn by, or in favor of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months.

We remain, &c.,

JOHN GIHON AND CO.

Under this second letter of credit, bills were drawn and paid by McCalmont, Brothers, and Co., to an amount exceeding in the whole the £10,000 stipulated for. The bills being all drawn at four months. The firm of J. and A. Lawrence not having made any remittances to pay the new advances, and the firm having failed, the agents of the London house on the 29th day of May, 1840, addressed the following letter to Mrs. Susan Lawrence, giving her notice of the non-payment of the advances.

New York, May 29, 1840.

Mrs. Susan Lawrence:—

Madam: We inclose on behalf of Messrs. McCalmont, Bros., and Co., a copy of the account of Messrs. J. and A. Lawrence with them, showing a balance due of £10,349 8s. 5d.—say ten thousand three hundred and forty-nine pounds eight shillings and five pence sterling, on first January last, with interest. These gentlemen not having fulfilled their engagements to reimburse this account, we claim payment of you under your guarantee to Messrs. McCalmont, Bros., and Company.

Respectfully, yours, J. GIHON AND CO.,
Agents of McCalmont, Bros., and Co., of London.

She declining to pay the deficit, the present action of *assumpsit* was brought against her to enforce the payment. At the trial upon the general issue, in addition to the facts already stated, it was in evidence that during the whole period of these transactions, Mrs. Lawrence resided at Brooklyn, (New York,) in the same house with her sons, J. and A. Lawrence. There was also evidence in the cause to show that McCalmont, Brothers, and Co., had by their agents, certain notes belonging to the firm of J. and A. Lawrence, and indorsed by the firm for collection, and the proceeds when received were to be applied towards the liquidation of the debt due to the London house, subject to their encashment on being paid at maturity, under which the sum of £1,309 16s. 6d. had been realized. The notes thus deposited for collection, which were dishonored at maturity, were protested accordingly, and the original plaintiffs offered the protests and notices to J. and A. Lawrence of the dishonor in evidence, [* 448] but the evidence as to some of the notices was *not full.

Much other evidence was given at the trial, which, however, it is not necessary to state.

The counsel for Mrs. Lawrence then asked the court to charge the jury as follows:—

1. That the said credit of 21st November, 1838, is a standing and continuing credit during the six months.

2. That defendant's guarantee of 17th December, 1838, is confined to the said credit, both as to time and amount.

3. That the acceptances and claims of the plaintiffs demanded in their declaration in this suit, are not covered by the guarantee of the defendant aforesaid.

4. That the new credit aforesaid of the 12th of June, 1839, is not a continuance or repetition of the first credit, but a departure from it, and is not covered by or embraced in the defendant's said guarantee.

5. That the nominal consideration of one dollar, and the past consideration stated in defendant's said guarantee, are not, nor is either of them, sufficient to sustain the said guarantee.

6. That the evidence that the said J. and A. Lawrence agreed to give a guarantee at the time said credit of 21st November, 1838, was given, is not sufficient in law to render valid the consideration expressed in defendant's said guarantee, or to sustain the said guarantee.

7. The facts being ascertained, the question whether the notice given to the defendant by the plaintiffs of the failure of the said J. and A. Lawrence to remit to cover the plaintiffs' acceptances was reasonable, is a question of law, and no notice, sufficient in law, was given of such failure to the defendant.

8. If the sufficiency of such notice be a question exclusively of fact, a reasonable and sufficient notice was not given to her of such failure of J. and A. Lawrence to remit as aforesaid.

9. The notes received by the plaintiffs, through their agents to collect, ought, when there was a failure of payment, to have been regularly protested, and due notice thereof served on the defendant and J. and A. Lawrence; and, on failure thereof, a credit should be allowed for the same.

The judge thereupon charged the jury, that the plaintiffs were not precluded from recovering under the guarantee in evidence by reason of any supposed want of consideration therefor; and the same was not without sufficient consideration.

* That the said guarantee of the 17th December, 1838, [* 449] was not limited to the credit of November 21, 1838, but was a standing and continuing guarantee, and did apply to, and was

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sufficient to embrace, transactions arising after the said credit of November, 1838, was expired.

That the new credit of June 12, 1839, and the advances and transactions under it, were not in law without the scope of the guarantee of December 17, 1838, and that the plaintiffs were, under the evidence, entitled to recover for the same under the said guarantee.

That the defendant was entitled to a reasonable notice of the default of the principal debtors, to enable her to take measures for her indemnity; that it was for the jury to consider, whether, under all the circumstances in evidence, the defendant had not had such notice.

That as to the notes turned over by the principal debtors to J. Gihon and Co., as the same were merely lodged with the latter, on their engagement that the proceeds of them, when received, were to be passed to their credit, the want of protest of any such notes as were dishonored, or of notice thereof to the said J. and A. Lawrence, would not entitle the defendant to charge the plaintiffs with the amount of such notes, or to claim a deduction for that amount.

And with that charge left the said cause to the jury, unto which charge, and to the refusal of the judge to charge otherwise, and as requested by defendant as aforesaid, the defendant's counsel then and there excepted.

The jury found a verdict for the plaintiffs, for \$47,105.97; upon which judgment was rendered for the plaintiffs; and upon that judgment and the exceptions taken at the trial, the present writ of error has been brought.

Some remarks have been made on the argument here upon the point in what manner letters of guarantee are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying, that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guarantee are commercial instruments — generally drawn up by merchants in brief language; sometimes inartificial, and often loose in their structure [* 450] and form; and to construe the words * of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. The remarks made by this

court in the case of *Bell v. Bruen*, 1 How. 169, 186, meet our entire approbation. The same doctrine was asserted in *Mason v. Pritchard*, 12 East, 227, where a guarantee was given for any goods he hath or may supply W. P. with to the amount of £100; and it was held by the court to be a continuing guarantee for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for, and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognized in *Haigh v. Brooks*, 10 Adol. & El. 309, and in *Mayer v. Isaac*, 6 Mees. & Wels. 605, and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in *Lee v. Dick*, 10 Pet. 482, and in *Mauran v. Bullus*, 16 Pet. 528. Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury.

Passing from these general considerations, let us now address ourselves to the points made at the argument. The first point is, that the second advance was made upon terms and under an agreement materially variant from that on which the guarantee was given, without any communication with the guarantor or her consent thereto. The variances insisted on are two; first, in requiring the bills to be drawn by or in favor of parties permanently resident in Europe; secondly, that if the bills were drawn from the continent of Europe, they should be made at the customary date, say three months. We think that there is no variance whatsoever, which is not fairly within the scope of the original guarantee, and was so contemplated by J. and A. Lawrence, as well as by the agents of the London house. This is explicitly proved by the evidence; for, upon the question arising, both the Lawrences and the agents agreed that it was a continuing guarantee, and as such no new letter of guarantee was needed. It is *true that Mrs. Lawrence was no party to [*451] this interpretation of the instrument; but then it is strong evidence to establish that it was neither a forced nor unnatural interpretation of the words. And the agents of the London house agreed to make the second advance upon the faith of it.

Now, looking to the very words of the guarantee, we see that it contemplated — not a single advance, and then it was to end — but

a continuing guarantee, and the very words are found in it. It also contemplated not only agreements which had been already made between J. and A. Lawrence and the agents, but also future agreements. The guarantor says: "I engage that they shall fulfil the agreements they have made, and shall make with you for meeting and reimbursing the payments which you may assume." And again: "You are to consider this a standing and continuing guarantee without the necessity of apprising me from time to time of your engagements and advances for the house." "So that new engagements and new advances were contemplated to be made to which the guarantee should attach without notice thereof." And this is not all, for the guarantee goes on to provide for its continuance in case of a change in the partners of either firm, (a change which would ordinarily be fatal to a guarantee;) and that the guarantee should apply to and continue upon transactions afterwards between the firms so changed, until notified by her to the contrary. It seems plain from all this language, that a series of new transactions, new agreements, and new engagements were within the contemplation of the parties; not advances for six months alone, but advances from time to time, for an indefinite period, until notice to the contrary should be given by the guarantor. It is difficult to conceive of any language more definite and more full to express the real intention of the parties. The original advance was indeed, agreed to be made in the manner stated in the first letter of credit; and if there be any variance between the terms of the first and the second letter of credit, that was left solely and exclusively for the immediate parties J. and A. Lawrence and the agents to adjust and consider. They might enter into any new engagements as to the mode of drawing the bill, and the time which they were to run at their pleasure, without breaking in upon the true intention of the guarantee. All the stipulations of the first letter of credit were retained in the second, and an additional provision made, that if bills were drawn from the continent of Europe, they should be made at the customary date and by [*452] a permanent resident. But this * left J. and A. Lawrence at full liberty to draw direct on London at four months, if they chose; and in point of fact no bills were ever drawn by them except direct on London, and not from the continent. The additional liberty given, or condition imposed, was not availed of; and if it had been, it would not have in any manner exonerated the guarantor from her responsibility. Without, therefore, looking to the question whether these variances might or might not have been material, if new arrangements and engagements had not been within the scope of the guarantee, we are of opinion, that the objection is, in the present case, not maintainable.

This view of the matter disposes also of the second, third, and fourth points made at the argument.

The fifth point is, that there is no valid consideration to support the guarantee. This is pressed under two aspects; the first is, that the consideration was past and not present; for the letter of credit had been already delivered to J. and A. Lawrence by the agents of the London house. The second is, that the payment of the one dollar is merely nominal and not sufficient to sustain the guarantee, if it had been received; and it is urged that it was not received. As to this last point, we feel no difficulty. The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman v. Tooth*, 5 Bingham's New Cases, 577, where the guarantor gave a guarantee for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guarantee good, and the consideration sufficient. In *Haigh v. Brooks*, 10 Adol. & El. 309, 323, the court held that a surrender by the guarantee of a former guarantee, even if it was not of itself binding upon the guarantor, was a sufficient consideration to take the case out of the statute of fraud and to sustain a promise made on the footing thereof. But independently of all authority, we should arrive at the same conclusion. The receipt of the one dollar is acknowledged; no *fraud is pretended or shown; and the consideration, if [* 453] standing alone in a *bonâ fide* transaction would sustain the present suit.

As to the other point, that the consideration was past, it admits of several answers, each of which is equally decisive. In the first place, although the Messrs. Lawrence had received the letter of credit before the guarantee was given, yet it was a part of the original agreement contemporaneous with the letter of credit, that it should be given; and if the guarantee had not been given, the whole advance might have been recalled as a fraud upon the London house. In the next place, it does not appear that all the bills for the £10,000, under the first letter of credit, were drawn before the guarantee was actually given; and if they were not, certainly it would attach upon the bills

drawn under the first credit after it was actually given. The contract was then a continuing contract on both, and partially performed only by one. In the next place, the guarantee itself uses language susceptible of being treated as a present continuing consideration *in fieri*. It is "in consideration of Messrs. J. and A. Lawrence having a credit with your house;" now, the word "having" imports a present or future advance, just as much as a past. The word "having" is in the present tense; and if the parties then understood the letter of credit to be *in fieri*, and to be absolute only upon a condition subsequent, namely, the giving of the guarantee, the word is the most appropriate which could be used. The case of *Haigh v. Brooks*, 10 Adol. & El. 309, approaches very near to the present. There the guarantee was "in consideration of being in advance to L. &c., I guarantee, &c." The court of king's bench thought that the words "being in advance" did not necessarily import a past advance, but might be applied to a present or future advance.

But that which puts the whole matter in the clearest light and beyond the reach of legal controversy, is that the advances now sued for were all made after the second letter of credit was given; and if the guarantee applied (as we hold it did) to those subsequent advances under the new engagements, then the consideration was complete as upon a present and not as upon a past consideration. In every view therefore, in which we can contemplate the objection, it has no just foundation in law.

As to the sixth point on the question, whether due notice of the failure of Messrs. J. and A. Lawrence to repay the advances had been given, it was a mere question of fact for the consideration of the jury, as to whether the guarantor had reasonable notice or [* 454] not. * They have found a verdict for the plaintiffs, and we are not at liberty to disturb it in a court of error.

As to the seventh point, the notes having been left for collection only with the agents of the London house, although indorsed by the Messrs. Lawrence, they do not fall within the strict rules of commercial law applicable to negotiable paper. Admitting for the sake of the argument, that notice was not punctiliously given by the agents, still, it resolves itself into a mere question of due diligence on the part of the agents to collect the notes, and falls under the general law of agency. No evidence was shown at the trial to establish any loss or damage on the part of Mrs. Lawrence for want of due protest and notice, (if they were not made;) and in the absence of such proof, we are not at liberty to presume that the agents did not do their duty.

The case of *Swift v. Tyson*, 16 Pet. 1, is entirely distinguishable

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from the present in its leading circumstances. There the question was not whether a person receiving a note as collateral security or for an antecedent debt was not bound to due diligence in its collection, otherwise he made it his own, which was not doubted; but whether taking it as collateral security or in payment of an antecedent debt, he was not to be treated as a *bond fide* holder for a valuable consideration, unaffected by any unknown equities between the original parties. This court held that he was.

Upon the whole we are all of opinion that there was no error in the rulings of the court, and the judgment is, therefore, affirmed with costs.

Ex parte in the Matter of CHARLES F. SIBBALD, Appellant, v. THE UNITED STATES.

2 H. 455.

THIS was a petition to alter a mandate, originally issued in a Florida land case, in 1836, and concerning which a further order was made in 1838. The petitioner now asked to have the mandate so changed that he should be enabled to take the 16,000 acres, to which he was held entitled, out of any ungranted public lands in East Florida.

* STORY, J., delivered the opinion of the court. [* 457]

On consideration of the petition filed in the above cause, it is the opinion of this court that it has no power to grant the relief prayed. Whereupon, it is now here ordered and adjudged by this court, that this petition be and the same is hereby dismissed.

AUSTIN L. ADAMS and ANN C. HARDING, Plaintiffs in Error, v. JULIA ROBERTS.

2 H. 486.

The court cannot give an instruction which makes the case turn on one point only, when there are other grounds necessary to be passed upon by the jury; nor one which assumes as true a controverted fact.

ERROR to the circuit court for the county of Alexandria in the District of Columbia, in a suit for freedom by the defendant in error. As the opinion of the court rested upon the want of applicability to the evidence of the instructions prayed for, it is necessary to insert the bills of exception.

[* 488]

1st Bill of Exceptions.

At the trial of this cause, the petitioner having given evidence tending to show that, previous to the year 1801, Sarah, the mother of the petitioner, was the property of Simon Summers, and remained in his possession until about the year 1799, when she was placed, by said Summers, in the possession of Wesley Adams, who, about that time, married the daughter of said Summers, and who lived then, and continued to live for many years thereafter, in Fairfax county, Virginia; then gave evidence that diligent search had been made among the records of Fairfax county, Virginia, for an original deed of manumission of said petitioner's mother, by said Summers, but no such original deed could be found, and that the same is lost; but that there was among said records the enrolment of a deed, whereof the annexed paper, marked A, is admitted to be a true copy, and of the certificates of acknowledgment, and the recording of the same. And further offered evidence, that said deed was personally acknowledged by the said Simon Summers, in the county court of the said county of Fairfax; the said slave, Sarah, being then there in the said county, and having always before resided in the said county. And the petitioner then read in evidence the said paper, marked A, purporting to be the copy of a deed of manumission from said Summers, of the negro woman, named Sarah, named therein; and then

[* 489] gave evidence tending to show that the petitioner was the child of said *named Sarah, and is now about 38 (28) years of age; and further gave evidence tending to show that the defendant, Harding, makes no claim to the petitioner in her own right, but solely by the direction of her co-defendant, Adams, who is the son of the Wesley Adams above named, and his said wife, the daughter of said Summers. And the petitioner further gave evidence tending to show that, about the year 1820, the said Wesley Adams brought Sarah, the petitioner's mother, to the public poor-house, in Fairfax county, State of Virginia, and applied to the overseers of the poor for said county, for alimony for said Sarah, as a free woman of color, and her two small children; and that a levy was made upon said county for their support, and they were supported until the year 1826, when a levy was made for the support of said Sarah and the three children, which she then had with her, but among whom the petitioner was not included; and that said levy, when raised, was placed in the hands of said Wesley Adams, for their support as aforesaid. And further gave evidence tending to show that Sarah passed as free for a number of years, and that Wesley Adams, about the year 1826, said that Sarah and her children were free, and that the

said Adams wanted to sell the petitioner to a witness, to serve him until she should reach twenty-five years of age, when she was to go free; and that Simon Summers had given slaves to him in such a way as to be of no service to him, as they became free so soon as they became valuable. And the petitioner further gave evidence tending to prove that, at the division of the estate of Simon Summers, who died in 1836, the defendant, Adams, was present, and that in said division, the said Sarah was brought into hotchpot, that is, Wesley Adams was charged, as distributee of Simon Summers's estate, with the value of the services of said Sarah, up to the year 1814, when she went free, and up to which time the said Summers had allowed her to serve Wesley Adams. And the plaintiff further offered evidence to prove that the said Simon Summers resided in the county of Fairfax before and until the 27th of February, 1801, when the county of Alexandria was erected,¹ consisting of a part of the said county of Fairfax; and the then residence of the said Simon Summers fell within the said county of Alexandria, in the District of Columbia, without any change of his actual residence; that the slaves mentioned in the deed of emancipation had always resided in the said county of Fairfax, up to the date of the said deed, and to the time of its acknowledgment as aforesaid.

The defendants then offered evidence tending to prove, that an *order was made by the overseers of the poor of [*490] the said county of Fairfax, in 1825, to demand of the said Wesley Adams the \$20 advanced him for the support of Sarah's infant children.

The defendants then gave evidence tending to show that said Sarah died some years ago on the land of John Adams, and after remaining two days there, was buried at the expense of the defendant, Austin L. Adams.

The defendants then gave evidence tending to show that at the date of the paper marked A, namely, 30th of December, 1801, the said Simon Summers was a resident of the county of Alexandria, District of Columbia, and did not reside in Fairfax county, Virginia. But the witnesses who proved the said residence of the said Summers, proved, on cross-examination, that at said last-mentioned date, the said Sarah was in the possession of Wesley Adams, in Fairfax county, Virginia; and that at said date Simon Summers owned 200 acres of woodland in said Fairfax county, and was interested in another tract of land in said Fairfax county, on which there was a house, and which was cultivated land, but which was tenanted by one Ferguson; and that said Simon Summers resided before 1800,

¹ 2 Stats. at Large, 105.

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in Fairfax county, in Virginia, and never removed from the place where he then resided; but that the place of his residence was included within the lines of the District of Columbia, and that he continued to reside in the same place until his death.

Whereupon the defendants, by their counsel, prayed the court to instruct the jury, that if they shall believe, from the above evidence, that the said Simon Summers did reside in the county of Alexandria, District of Columbia, at the time of the executing and acknowledging the deed aforesaid, and continued so to reside until his death, in 1836, then that the deed of emancipation so, as aforesaid, made, executed, acknowledged, and recorded in the county court of Fairfax county, Virginia, does not entitle the petitioner to freedom under the statute of Virginia, in such cases made and provided, entitled "An act reducing into one the several acts concerning slaves, free negroes, and mulattoes," passed December 17, 1792.

But the court refused to give the instruction as prayed, &c.

[*491]

*2d Bill of Exceptions.

Be it remembered, that on the trial of this cause, the petitioner and defendant having offered the evidence contained in the first bill of exceptions, and this being all the evidence adduced on the part of the petitioner and defendant aforesaid, the defendants, by their counsel, prayed the court to instruct the jury that the testimony aforesaid, although believed by the jury, is not sufficient in law to maintain the issue joined; and, therefore, the law is for the defendants.

But the court refused to give the instruction so prayed, not being willing to certify that the evidence so stated as aforesaid is all the evidence adduced by the parties in the said cause, and because such an instruction would take the cause from the consideration of the jury, without giving the petitioner the benefit of the presumption which the jury might draw from the facts so given in evidence.

Neale and Bradley, for the plaintiffs in error.

Brent, Sen., for the defendant.

[*494] *WAYNE, J., delivered the opinion of the court.

We think the court below did not err in refusing to give the instructions asked for by the defendants in either the 1st or 2d bill of exceptions.

By the statute of Virginia, two modes are pointed out in which manumission by deed can be accomplished.

1. The instrument in writing under the hand and seal of the party, must be attested and proved in the county or corporation court by two witnesses; or

2. It must be acknowledged by the party in the court of the county where he or she resides.

Either of these modes is effectual. It is stated in the bill of exceptions, and is not contradicted, that the county of Alexandria was made on the 27th of February, 1801, being composed of what had been a part of the county of Fairfax, in Virginia, and that Summers owned 200 acres of woodland in Fairfax county, and was interested in another tract of land also in said county, upon which there was a house. But it does not appear how far within the line of the district the actual residence of Summers was thrown; whether the dividing line ran through his farm, separating the house from the great body of the land, or whether the land upon which his slaves resided was a separate estate, detached from his residence. But it sufficiently appears, that up to February, 1801, Summers had been accustomed to resort to the court of Fairfax county, for the transaction of business of every description, and that the jurisdiction under which he lived, then became changed, without its having been done by his removal from where he had lived before.

*The claimant, in support of her freedom, alleges, that [*495] Summers executed an instrument under his hand and seal on the 30th December, 1801, to which the names of Charles Little and Harrison Cleaveland are attached as witnesses. Upon the 18th of January, 1802, by a copy admitted to be a copy of that instrument, and not objected to when offered as evidence, it appears that Summers went into court in Fairfax county and acknowledged it to be a deed of manumission. The court ordered it to be recorded, and it was done. There is nothing in the record to show whether or not the two witnesses were present with him in court when he made this acknowledgment. If they were, the case would clearly fall within the first mode pointed out by the statute, being an instrument in writing under the hand and seal of the party, attested and proved in the county court by two witnesses. It is not said in what court the attestation and proof must be made, in the case of a non-resident owning slaves resident in Virginia, but we presume that in such a case the attestation and proof ought to be made in the county court where the slave resides.

It is not necessary, however, to decide that question in this case, because the proof, to substantiate and give validity to the instrument, does not exist; but we have recited the preceding facts because they are evidence in the case, and are connected with the paper purport-

ing to be a copy of a deed of manumission, which was introduced to sustain the claimant's demand for freedom. This, then, is the copy of an original paper, not denied to be such by the plaintiffs in error, and the question occurring is, how ought it to have been considered in the court below as a part of the evidence in the cause, with reference to the instructions asked? In the first instruction, the court is asked to put the case, that the deed of emancipation so as aforesaid made, executed, and acknowledged and recorded, did not entitle the petitioner to freedom, under the statute in such cases made and provided by an act, entitled "An act reducing into one the several acts concerning slaves, free negroes, and mulattoes," passed December 17, 1792.

The paper in evidence was the copy of an original, the execution of which by the grantor was not denied. It was received as evidence upon proof of the loss of the original. It was forty years old. No proof of its execution was necessary, its antiquity proved it. But, it is said, the proof and attestation before the court in Virginia, to give it validity, was wanting, and that it appeared to be so upon the face of the paper given in evidence. That might or might not

be so. But it was a fact in controversy between the parties, as much so as any other fact in the case, and the

[*496] court could not be asked to instruct the jury upon their belief of another single fact, namely, the residence of Simon Summers in the county of Alexandria, that the party was not entitled to freedom under the statute of Virginia. The instruction as asked, excludes all the other evidence, and puts the legal issue proposed on it upon a single fact. It excludes, also, all presumptions which the jury might make from the other evidence in connection with the antiquity of the paper which was before them. The court did not err in refusing to give the first instruction.

The second instruction asked for by the defendants in the court below was, that the testimony, although believed by the jury, was not sufficient in law to entitle the petitioner to her freedom.

If the jury believed all the evidence offered, the case would have stood thus: Susan, the mother of Julia, was to become free on the 1st of January, 1814. If they believed that fact, and also believed that Julia was born after that day, she was the child of a free woman, and of course free herself. The trial took place at May term, 1842. Evidence was offered to show that Julia was then about twenty-eight years old. If she was twenty-eight years of age at any period between the 1st of January and May, 1842, of course she was born after her mother had become free. The instruction asked the court to deprive the jury of the power of saying she was born in that

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interval. This was a fact especially proper for the consideration of the jury, and the court could not have given the instruction asked by the defendant, that the testimony was not sufficient in law to entitle the petitioner to her freedom, without assuming the fact that Julia was not born in the interval already mentioned. We think the court did not err in refusing the instruction.

The judgment of the court below is affirmed.

THE LOUISVILLE, CINCINNATI, AND CHARLESTON RAILROAD COMPANY,
Plaintiffs in Error, v. THOMAS W. LETSON, Defendant.

2 H. 497.

Railroad corporation, chartered by the State of South Carolina, to build and manage a railroad in that State, may be sued by a citizen of New York, in the circuit court of the United States for the district of South Carolina, although some of the owners of shares of the capital stock are not citizens of South Carolina, and the State of South Carolina owned some of the shares.

ERROR to the circuit court of the United States for the district of South Carolina, in an action of covenant broken by Letson, a citizen of New York. The defendant pleaded to the jurisdiction of the court as follows:—

“And the said The Louisville, Cincinnati, and Charleston Railroad Company come and say, that this court ought not to have or take further cognizance of the action aforesaid, because they say that the said The Louisville, Cincinnati, and Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford and Charles Baring, are, and were at the time of commencing the said * action, citizens of North Carolina; and the State [*498] of South Carolina is, and was at the time of commencing the said action, a member of the said corporation, and the Bank of Charleston, South Carolina, is also, and was at the time of commencing the said action, a member of the said corporation, which said The Bank of Charleston, South Carolina, is a corporation, some of whose members, namely, Thomas Parish and Edmund Lafau, are, and were at the time of commencing the said action, citizens of New York. And The Charleston Insurance and Trust Company is now, and was at the time of commencing the said action, a member of the said Louisville, Cincinnati, and Charleston Railroad Company; which said The Charleston Insurance and Trust Company, is a corporation, some of whose members, namely, Samuel D. Dickson, Henry

R. Dickson, Henry Parish, and Daniel Parish, are now, and were at the time of commencing the said action, citizens of the State of New York.

“And this the said Louisville, Cincinnati, and Charleston Railroad Company are ready to verify. Wherefore they pray judgment whether this court can or will take further cognizance of the action aforesaid.”

To this plea there was a general demurrer, which, upon argument, was sustained by the court.

The railroad company then pleaded the general issue, and the cause went to trial. The jury found a verdict for the plaintiff, and this writ of error was brought to review the opinion of the court upon the demurrer.

Mazyck, for the plaintiffs in error.

Pettigru, *Lesesne*, and *Legaré*, (attorney-general,) for the defendant in error.

[* 550] * WAYNE, J., delivered the opinion of the court.

The jurisdiction of the court is denied in this case upon the grounds that two members of the corporation sued are citizens of North Carolina; that the State of South Carolina is also a member, and that two other corporations in South Carolina are members, having in them members who are citizens of the same State with the defendant in error.

The objection, that the State of South Carolina is a member, cannot be sustained. Cases have been already decided by this court which overrule it. The doctrine is, if the State be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction. *United*

States v. Peters, 5 Cranch, 115. In the case of *The Bank* [* 551] of the * *United States v. Planters' Bank of Georgia*, this court ruled “that when a government becomes a partner in a trading concern, it divests itself, so far as it concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many States of this Union, who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The State of Georgia, by giving to the

bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character." 9 Wheat. 907. South Carolina stands in the same attitude in the case before us that Georgia did in the case in 9 Wheat. It is no objection, then, to the jurisdiction of the court, on account of the averment in the plea, that the State of South Carolina is a member of The Louisville, Cincinnati, and Charleston Railroad Company. The true principle is, that the jurisdiction of the circuit courts of the United States cannot be decreed or taken away on account of a State having an interest in a suit, unless the State is a party on the record. Osborne and The Bank of the United States, 9 Wheat. 852. This must be the rule under our system, whether the jurisdiction of the court is denied on account of any interest which a State may have in the subject-matter of the suit, or when it is alleged that jurisdiction does not exist on account of the character of the parties.

We will here consider that averment in the plea which alleges that the court has not jurisdiction, "because The Louisville, Cincinnati, and Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford and Charles Baring, are and were, at the time of commencing the said action, citizens of North Carolina."

The objection is equivalent to this proposition, that a corporation in a State cannot be sued in the circuit courts of the United States, by a citizen of another State, unless all the members of the corporation are citizens of the State in which the suit is brought.

The suit, in this instance, is brought by a citizen of New York in the circuit court of the United States for the district of South Carolina, which is the locality of the corporation sued.

* Jurisdiction is denied, because it is said it is only given [* 552] when "the suit is between a citizen of the State where the suit is brought, and a citizen of another State."¹ And it is further said that the present is not such a suit, because two of the corporators are citizens of a third State."

The point in this form has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits, until it was made in this case. It has not then been directly ruled in any case. Our inquiry now is, what is the law upon the proposition raised by the plea.

Our first remark is, that the jurisdiction is not necessarily excluded by the terms, when "the suit is between a citizen of the State where

¹ 1 Stats. at Large, 78.

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the suit is brought and a citizen of another State," unless the word citizen is used in the constitution and the laws of the United States in a sense which necessarily excludes a corporation.

A corporation aggregate is an artificial body of men, composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politic, or artificial body, are the franchises and liberties thereof, which bind and unite all its members together; and in which the whole frame and essence of the corporation consist. Bac. Abr. Cor. (A.) It must of necessity have a name, for the name is, as it were, the very being of the constitution, the heart of their combination, without which they could not perform their corporate acts, for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name. Bac. Abr. Cor. (C.)

Composed of persons, it may be that the members are citizens; and if they are, though the corporation can only plead and be impleaded by its name, or the name by which it may sue or be sued, if a controversy arises between it and a plaintiff who is a citizen of another State, and the residence of the corporation is in the State in which the suit is brought, is not the suit substantially between citizens of different States, or, in the words of the act giving to the courts jurisdiction, "a suit between a citizen of the State where the suit is brought and a citizen of another State?"

Jurisdiction, in one sense, in cases of corporations, exists in virtue of the character of members, and must be maintained in the courts of the United States, unless citizens can exempt themselves from their constitutional liability to be sued in those courts, by a citizen of another State, by the fact, that the subject of controversy between them has arisen upon a contract to which the former are parties, in their corporate and not in their personal character.

[* 553] * Constitutional rights and liabilities cannot be so taken away, or be so avoided. If they could be, the provision which we are here considering could not comprehend citizens universally, in all the relations of trade, but only those citizens in such relations of business as may arise from their individual or partnership transactions.

Let it then be admitted, for the purposes of this branch of the argument, that jurisdiction attaches in cases of corporations, in consequence of the citizenship of their members, and that foreign corporations may sue when the members are aliens; does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another State, that all of the incorporators must be citizens of the State in which the suit is brought?

The argument in support of the affirmative of this inquiry is, that in the case of a corporation in which jurisdiction depends upon the character of the parties, the court looks beyond the corporation to the individuals of which it is composed, for the purpose of ascertaining whether they have the requisite character, and for no other purpose.

The object would certainly be to ascertain the character of the parties, but not to the extent of excluding all inquiry as to what the effect will be, when it has been ascertained that the corporators are citizens of different States from that of the locality of the corporation, where by its charter it can only be sued.

Then the question occurs, if the corporation be only suable where its locality is, and those to whom its operations are confided are citizens of that State, and a suit is brought against it by a citizen of another State, whether by a proper interpretation of the terms giving to the circuit court jurisdiction, it is not a suit between citizens of the State where the suit is brought and a citizen of another State. The fact that the corporators do live in different States does not aid the solution of the question.

The first, obvious, and necessary interpretation of the terms by which jurisdiction is given, is, that the suit need not be between citizen and citizen, but may be between citizens. Then, do the words, "of the State where the suit is brought," limit the jurisdiction to a case in which all the defendants are citizens of the same State?

The constitutional grant of judicial power extends to controversies "between citizens of different States." The words in the legislative grant of jurisdiction, "of the State where the suit is brought and * a citizen of another State," are obviously no more [* 554] than equivalent terms to confine suits in the circuit courts to those which "are between citizens of different States." The words in the constitution, then, are just as operative to ascertain and limit jurisdiction as the words in the statute. It is true, that under these words, "between citizens of different States," congress may give the courts jurisdiction between citizens in many other forms than that in which it has been conferred. But in the way it is given, the object of the legislature seems exclusively to have been to confer jurisdiction upon the court, strictly in conformity to the limitation as it is expressed in the constitution, "between citizens of different States."

A suit, then, brought by a citizen of one State against a corporation by its corporate name, in the State of its locality, by which it was created, and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction

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is concerned, between citizens of the State where the suit is brought and a citizen of another State. The corporators, as individuals, are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the State where the suit is brought, jurisdiction attaches over the corporation; nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different State. It may be said that the suit is against the corporation, and that nothing must be looked at but the legal entity, and then that we cannot view the members except as an artificial aggregate. This is so, in respect to the subject-matter of the suit and the judgment which may be rendered; but if it be right to look to the members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction, cannot take it away, when there are other members who are citizens, with the necessary residence to maintain it.

But we are now met and told that the cases of *Strawbridge and Curtis*, 3 Cranch, 267, and that of *The Bank of the United States and Deveaux*, 5 Cranch, 84, hold a different doctrine.

We do not deny that the language of those decisions do not justify in some degree the inferences which have been made from them, or that the effect of them has been to limit the jurisdiction of the circuit courts in practice to the cases contended for by the counsel for the plaintiff in error. The practice has been, since those cases were decided, that if there be two or more plaintiffs and two or more

joint defendants, each of the plaintiffs must be capable of [* 555] suing each * of the defendants in the courts of the United

States in order to support the jurisdiction, and in cases of corporation to limit jurisdiction to cases in which all the corporators were citizens of the State in which the suit is brought. The case of *Strawbridge and Curtis* was decided without argument. That of the *Bank and Deveaux*, after argument of great ability. But never since that case has the question been presented to this court, with the really distinguished ability of the arguments of the counsel in this, in no way surpassed by those in the former. And now we are called upon in the most imposing way to give our best judgments to the subject, yielding to decided cases every thing that can be claimed for them on the score of authority, except the surrender of conscience.

After mature deliberation, we feel free to say, that the cases of *Strawbridge and Curtis*, and that of the *Bank and Deveaux*, were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed. Indeed, it is difficult not to feel

that the case of *The Bank of the United States and The Planters' Bank of Georgia*, 9 W. 904, is founded upon principles irreconcilable with some of those on which the cases already adverted to were founded. The case of *The Commercial Bank of Vicksburg and Slocomb*, 14 P. 60, was most reluctantly decided upon the mere authority of those cases. We do not think either of them maintainable upon the true principles of interpretation of the constitution and the laws of the United States. A corporation, created by a State, to perform its functions under the authority of that State, and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State. We remark, too, that the cases of *Strawbridge and Curtis*, and the *Bank and Deveaux*, have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this court *have [*556] at all times partaken of the same regret, and that, whenever a case has occurred on the circuit, involving the application of the case of the *Bank and Deveaux*, it was yielded to, because the decision had been made, and not because it was thought to be right. We have already said that the case of *The Bank of Vicksburgh and Slocomb*, 14 Pet. 60, was most reluctantly given, upon mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet been done. It has led to a review of the principles of all the cases. We cannot follow further, and upon our maturest deliberation we do not think that the cases relied upon for a doctrine contrary to that which this court will here announce, are sustained by a sound and comprehensive course of professional reasoning. Fortunately, a departure from them involves no change in a rule of property. Our conclusion, too, if it shall not have universal acquiescence, will be admitted by all to be coincident with the policy of the constitution and the condition of our country. It is coincident also with the recent legislation of congress, as that is shown by the act of the 28th of February, 1839,¹

¹ 5 Stats. at Large, 321.

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in amendment of the acts respecting the judicial system of the United States. We do not hesitate to say, that it was passed exclusively with an intent to rid the courts of the decision in the case of *Strawbridge and Curtis*.

But if in all we have said upon jurisdiction we are mistaken, we say that the act of 28th of February, 1839, enlarges the jurisdiction of the courts, comprehends the case before us, and embraces the entire result of the opinion which we shall now give.

The first section of that act provides: "That wherein any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein, shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer." We think, as was said in the case of *The Commercial Bank of Vicksburgh v. Slocomb*, that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the 11th section of the

Judiciary Act, which declares: "That no civil suit shall be [*557] brought before either *of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, but a reëxamination of the entire section will not permit us to reaffirm what was said in that case, that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties. If the act, in fact, did no more than to make a change, by empowering the courts to take cognizance of cases other than such as were permitted in that clause of the 11th section, which we have just cited, it would be an enlargement of jurisdiction as to the character of parties. The clause, that the judgment or decree rendered shall not conclude or prejudice other parties, who have not been regularly served with process, or who have not voluntarily appeared to answer, is an exception, exempting parties so situated from the enactment, and must be so strictly applied. It is definite as to the persons of whom it speaks, and contains no particular words, as a subsequent clause, by which the general words of the statute can be restrained. The general words embrace every suit at law or in equity, in which there shall be several defendants, "any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought,

or who shall not voluntarily appear thereto." The words, "shall not be inhabitants of," applies as well to corporators as to persons who are not so; and if, as corporators, they are not suable individually, and cannot be served with process, or voluntarily appear in an action against the corporation of which they are members, the conclusion should be that they are not included in the exception, but are within the general terms of the statute. Or, if they are viewed as defendants in the suit, then, as corporators, they are regularly served with process in the only way the law permits them to be, when the corporation is sued by its name.

The case before us might be safely put upon the foregoing reasoning and upon the statute, but hitherto we have reasoned upon this case upon the supposition that, in order to found the jurisdiction in cases of corporations, it is necessary there should be an averment, which, if contested, was to be supported by proof, that some of the corporators are citizens of the State by which the corporation was created, where it does its business, or where it may be sued. But this has been done in deference to the doctrines of former cases in this court, upon which we have been commenting. But there is a broader ground upon which we desire to be understood, upon which we *altogether rest our present judgment, [* 558] although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued. And in coming to this conclusion, as to the character of a corporation, we only make a natural inference from the language of this court upon another occasion, and assert no new principle. In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, this court says: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as were supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may

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be allowed, individuality — properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being.”

Again, *The Providence Bank and Billings*, 4 Pet. 514, it is said: “The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.” In that case, the bank was

adjudged to be liable to a tax on its property as an individual. [* 559] Lord Coke, says: “Every corporation * and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of the statute.” In the case of *King v. Gardner*, in Cowper, 79, a corporation was decided by the Court of King’s Bench, to come within the description of occupiers or inhabitants. In *The Bank and Deveau*, the case relied upon most for the doctrines contended for by the plaintiff in error, it is said of a corporation, “this ideal existence is considered as an inhabitant, when the general spirit and purposes of the law requires it.” If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the circuit court of the United States, when the plaintiff has the proper residence? Certainly the spirit and purposes of the law require it. We confess our inability to reconcile these qualities of a corporation — residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the State in which the suit is brought. When the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction.

Our conclusion makes it unnecessary for us to consider that averment in the plea which denies jurisdiction on the ground that citizens

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of the same State with the plaintiff, are members of corporations in South Carolina, which are members of The Louisville, Cincinnati, and Charleston Railroad Company.

The judgment of the circuit court below is affirmed.

14 H. 80; 15 H. 233; 16 H. 814; 20 H. 227; 21 H. 202; 1 B. 286; 5 Wal. 541; 7 Wal. 118.

NATHANIEL BURWELL, Complainant and Appellant, v. DANIEL CAWOOD, WILLIAM C. GARDNER, Executor of JOSEPH MANDEVILLE, deceased, and JOHN WEST, Defendants.

2 H. 560.

A testator, directing the continuance of a partnership of which he was a member at the time of his death, may either bind all, or a specific part, or only so much of his assets as are embarked in the business of the firm.

An intention to render the general assets liable, is only to be made out by the use of unambiguous language; and as the will in question does not clearly manifest that intent, the creditors of the firm have no claim upon the general assets.

The words "residuary legatee" may carry the real estate, where such can be made out, from other parts of the will, to have been the testator's intention.

APPEAL from the circuit court of the United States for the District of Columbia. The case is stated in the opinion of the court.

Neale and Coxe, for the appellant.

Smith and Jones, contra.

* STORY, J., delivered the opinion of the court. [* 573]

This is an appeal from a decree of the circuit court of the United States for the District of Columbia, sitting in equity in the county of Alexandria.

On the 9th of July, 1836, Joseph Mandeville, deceased, by certain articles then executed, entered into partnership with Daniel Cawood, one of the defendants, for the term of three years from the 1st of September, 1835, under the firm of Daniel Cawood and Company. On the 3d of June, 1837, Mandeville made his last will, by which in the introductory clause he said: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal property as I may possess when called hence to a future state." He then proceeded to make sundry bequests of his real and personal estate to different persons, and then added: "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay the same." He immediately added: "John West, one of the defendants, formerly of Alexandria, now of Mobile, I hereby make

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my residuary legatee, recommending him to consult with and follow the advice of my executors in all concerning what I leave to him." The testator, on the 11th of July, 1837, made the following codicil to his will: "It is my will that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood and Company, shall be continued thereon until the expiration of the term limited by the articles between us; the business to be continued by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide." The testator appointed Robert J. Taylor and William C. Gardner, (one of the defendants,) executors of his will, and died in July, 1837. His will and codicil were duly proved after his death, and Taylor having renounced the executorship, Gardner took upon himself the administration of the estate under letters testamentary granted to him by the orphans' court of Alexandria county.

Cawood, after the testator's death, carried on the copartnership in the name of the firm, and failed in business before the regular expiration thereof, according to the articles.

[*574] * The present bill was originally brought against Cawood and Gardner, as executors of Mandeville, by the plaintiff, Burwell, alleging himself to be a creditor of the firm upon debts contracted with him by Cawood, on behalf of the firm, after Mandeville's death, namely, on a promissory note, dated the 28th of July, 1838, for \$800, and on an acceptance of a bill of exchange, drawn by Burwell on the same day for \$1,000, in favor of one William H. Mount, both of which remained unpaid. The bill charged the failure of Cawood in trade, and his inability to pay the debts due from the firm. It also charged that Gardner, the executor, had assets sufficient to satisfy all the debts of the testator, and all the debts of Cawood and Company; and it sought payment of the debt due to the plaintiff out of those assets.

The defendant, Gardner, put in an answer, denying that he had such accurate information as to enable him to say whether the partnership funds in the hands of Cawood were sufficient to pay the debts of the firm or not; and not admitting that the assets of the testator in his hands were liable to the payment of the debts of the firm, and requiring proof of such liability, and alleging that he had not assets of the testator in his hands sufficient to satisfy the plaintiff's claims, after satisfying two specified judgments.

The defendant, Cawood, not having made any answer at this stage of the cause, the bill was thereupon taken against him *pro confesso*; subsequently, he put in an answer; and thereupon it was, by consent of the plaintiff, and Cawood, and Gardner, the executor, referred to a

master to take an account of the assets of the testator, of the debts due to him, of the value of his real estate, and to settle the accounts and transactions of the firm of Cawood and Company until its termination, and of the individual partners with the firm, to take an account of the assets of the firm, and the outstanding debts of the firm, and the debts due thereto, &c.; and also to ascertain whether the debt due to the plaintiff arose in the partnership transactions, and is now due.

Cawood, by his answer, admitted generally the facts stated in the bill; but he also alleged that he neither admitted nor denied the insolvency of the firm, averring that he had satisfied claims against the firm since it terminated, to the amount of about \$14,000, from the firm funds, and was engaged in the collection of the outstanding debts due thereto, and that the firm still owed debts to the amount of about \$7,000.

The master made his report in May, 1841, the details of which it * is not necessary to mention. In November of the [* 575] same year, it was referred to another commissioner to take an account of the assets of Mandeville in the hands of his executor, who afterwards made a report accordingly. At this stage of the proceedings, John West (the residuary legatee, so called in the will) claiming to be interested in the subject-matter, the bill was amended by making West a party, and he filed a demurrer to the bill. The demurrer was afterwards set down for argument, and the court being of opinion that the assets of Mandeville in the hands of his executor (Gardner) were not chargeable with any debt contracted by Cawood in the name of the firm, after the death of Mandeville, sustained the demurrer, and dismissed the bill with costs. From this decree of dismissal the present appeal has been taken to this court.

The argument has spread itself over several topics which are not, in our judgment, now properly before us, whatever may have been their relevancy in the court below. The real question arising before us upon the record is, whether the general assets of the testator, Mandeville, in the hands of his executor, are liable for the payment of the debt due to the plaintiff, which was contracted after Mandeville's death. If they are not, the bill was properly dismissed, whatever might be the remedy of the plaintiff against Cawood, if the suit had been brought against him alone for equitable relief, upon which we give no opinion. In general, the surviving partner is liable at law only; and no decree can be made against him, although he may be a proper party to the suit in equity, as being interested to contest the plaintiff's demand, unless some other equity intervenes; and so it was held in *Wilkinson v. Henderson*, 1 Mylne & Keene, 582, 589.

The bill, as framed, states the insolvency of Cawood, and seeks no separate relief against him, and therefore, if it is maintainable at all, it is so solely upon the ground of the liability of the general assets of Mandeville to pay the plaintiff jointly with the partnership funds in the hands of Cawood. In respect to another suggestion that West was not a necessary party to the bill, in his character of residuary legatee of the personalty, that may be admitted; at the same time it is as clear that as he had an interest in that residue, if Mandeville's general assets were liable for the plaintiff's debt; and, therefore, the plaintiff might at his option join him in the suit, and if West did not object, no other person would avail himself of the objection of his misjoinder.

Then, as to the liability of the general assets of Mandeville in the hands of his executor for the payment of the plaintiff's debt, [* 576] we are * of opinion that they are not so liable, and shall now proceed to state the reasons for this opinion.

By the general rule of law, every partnership is dissolved by the death of one of the partners. *Scholfield v. Eichelberger*, 7 Pet. 586. It is true that it is competent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place in virtue of such agreement only, as the act of the parties, and not by mere operation of law. A partner, too, may, by his will, provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. But, then, in each case the agreement or authority must be clearly made out; and third persons, having notice of the death are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds; and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress.

A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner, or executor, or other person carrying on the trade may be personally responsible for all the debts contracted. This is clearly established by the case *Ex parte Garland*, 10 Ves. 110, where the subject was very fully dis-

cussed by Lord Eldon; and *Ex parte* Richardson, 3 Madd. 138, 157, where the like doctrine was affirmed by Sir John Leach, (then vice-chancellor,) and by the same learned judge when master of the rolls, in *Thompson v. Andrews*, 1 Mylne & Keene, 116. The case of *Hankney v. Hammond*, before Lord Kenyon, when master of the rolls, reported in *Cooke's Bankrupt Law*, 67, 5th ed., and more fully in a note to 3 Madd. Rep. 148; so far as may be thought to decide that the testator's assets are generally liable under all circumstances, where the trade is directed to be carried on after his death, has been completely overturned by other later cases, and expressly overruled by Lord Eldon in 10 Ves. 110, 121, 122, where he stated that it stood alone, and he felt compelled to decide against [*577] its authority. The case of *Pitkin v. Pitkin*, 7 Conn. 307, is fully in point to the same effect, and indeed, as we shall presently see, runs *quatuor pedibus* with the present.

And this leads us to remark, that nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without, in effect, saying, at the same time, that the payments may all be recalled if the trade should become unsuccessful or ruinous. Such a result would ordinarily be at war with the testator's intention in bequeathing such legacies and residue, and would, or might, postpone the settlement of the estate for a half-century, or until long after the trade or continued partnership should terminate. Lord Eldon, in 10 Ves. 110, 121, 122, put the inconvenience in a strong light, by suggesting several cases where the doctrine would create the most manifest embarrassments, if not utter injustice; and he said that the convenience of mankind required him to hold that the creditors of the trade, as such, have not a claim against the distributed assets in the hands of third persons, under the directions in the same will, which has authorized the trade to be carried on for the benefit of other persons. This, also, was manifestly the opinion of Sir John Leach, in the cases 3 Madd. 138; 1 Mylne & Keene, 116; and was expressly held in the case in 7 Conn. 307.

Keeping these principles in view, let us now proceed to the examination of the will and codicil in the present case. There can, we think, be no doubt that the testator intended by his will to dispose of the whole of his estate, real and personal. The introductory words

to his will already cited, show such an intention in a clear and explicit manner. The testator there says: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal estate as I may possess when called hence to a future state." He, therefore, looks to the disposal of all the estate he shall die possessed of. It is said that, admitting such to be his intention, the testator has not carried it into effect, because the residuary clause declares John West his "residuary legatee" [* 578] only, and * not his residuary devisee also; and that we are to interpret the words of the will according to their legal import, as confined altogether to the residue of the personal estate. This is, in our judgment, a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskilful man, and not versed in legal phraseology. The cardinal rule in the interpretation of wills, is, that the language is to be interpreted in subordination to the intention of the testator, and is not to control that intention when it is clear and determinate. Thus, for example, the word "legacy" may be construed to apply to real estate where the context of the will shows such to be the intention of the testator. Thus, in *Hope v. Taylor*, 1 Burr. 268, the word "legacy" was held to include lands, from the intention of the testator deduced from the context. The same doctrine was fully recognized in *Hardacre v. Nash*, 5 Term Rep. 716. So, in *Doe dem. Tofield v. Tofield*, 11 East, 246, a bequest of "all my personal estates" was construed upon the like intention to include real estate. But a case more directly in point to the present, and differing from it in no essential circumstances, is *Pitman v. Stevens*, 15 East, 505. There the testator, in the introductory clause of his will, said: "I give and bequeathe all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts is paid. I hereby appoint Capt. Robert Preston my residuary legatee and executor." The testator then proceeded to give certain pecuniary legacies, and finally recommended his legatee and executor to be kind and friendly to his brother in law, J. C., &c., and begs him to do something handsome for him at his death, &c. The question was, whether Preston was entitled to the real estate of the testator, under the will, and the court held that he was, and that the words "residuary legatee and executor," coupled with the introductory clause and the recommendation, clearly established it. Upon that occasion, Lord Ellenborough, after referring to the words of the introductory clause, said: "Then he appoints Capt. P. his residuary legatee and executor; residuary legatee and executor of what? of all that he should die possessed of, real and personal, of what nature and kind soever; that is, of all he should

not otherwise dispose of. The word 'legatee,' according to the cases, particularly *Hardacre v. Nash*, may be applied to real estate, if the context requires it, as was said by Lord Kenyon upon the word 'legacy.' Then, in the subsequent parts of the will, he contemplates that his residuary legatee and executor will have the disposition *of his whole funds; but after some legacies and [*579] annuities, he recommends him to be kind and friendly to his brother in law," &c.

In the present case, it is plain that the testator contemplated some positive benefit to West, when he designated him as his residuary legatee; and yet, at the same time, he contemplated that his personal property might not be sufficient to cover the amount of legacies given by his will; and in that event he directs his executors to dispose of so much of his real estate as will fully pay his legacies; so that, if we restrain the words "residuary legatee" to the mere personalty, we shall defeat the very intention of the testator, apparent upon the face of the will, to give some beneficial interest to West, in an event which he yet contemplated as not improbable. On the other hand, if we give an enlarged and liberal meaning to the residuary clause as extending to the real estate, it will at once satisfy the introductory clause, and upon a deficiency of the personal assets will still leave an ample amount to the beneficiary, who appears to have been an object of the testator's bounty. But if this interpretation should be (as we think it is not) questionable; one thing is certain, and that is, that the testator did not contemplate that his personal assets would not be more than sufficient to pay all his debts; for he does not charge his real estate with his debts, but only with his legacies, in case of any deficiency of personal assets; and the residuary clause, if it were limited to the mere residue of his personal assets would also show that the testator did not provide for any debts which should arise from any subsequent transactions after his death.

If this be so, then we are to look to the codicil to see whether any different intention is there disclosed in clear and unambiguous terms. In the first place, the language of the codicil is just such as the testator might properly have used, if he intended no more than to pledge his funds already embarked in the partnership for the payment of the partnership debts. The codicil says: "It is my will that my 'interest' in the copartnership, &c., shall be continued therein until the expiration of the term limited by the articles." Now, his interest in the firm then was his share of the capital stock and profits, after the payment of all debts and liabilities due by the firm. It is this interest, and not any new capital, which he authorizes to be embarked in the firm. He does not propose to add any thing to his existing interest:

but simply to continue it as it then was. How, then, can this court say that he meant to embark all his personal assets in the [* 580] hands of his executor as a pledge for the future debts, * or future responsibilities, or future capital of the firm? That would be to enlarge the meaning of the words used beyond their ordinary and reasonable signification. And besides, it is plain that the testator did not mean to have the payment of his legacies indefinitely postponed, until the expiration of the articles, and the ascertainment and final adjustment of the concerns of the firm, which might perhaps extend to ten or twenty years. So that to give such an enlarged interpretation to the terms of the codicil, (as is contended for,) for the codicil must be construed as if it were incorporated into the will, would be to subject the legatees to all the fluctuations and uncertainties growing out of the future trade, and might deprive the residuary legatee of every dollar intended for his benefit. There is another consideration of the matter, which deserves notice. Would the real estate of the testator, upon a deficiency of his personal assets, be liable for the debts of the firm contracted after his death, by mere operation of law, as it would be for such debts as were contracted in his lifetime? If it would, then it is apparent, that all the legatees and devisees might in the event of the irretrievable and ruinous insolvency of the firm be deprived of all their legacies and devises, although the legacies were charged upon the real estate. If it would not, then it is equally apparent that the testator did not contemplate any liability of his general assets, real and personal, for the payment of any debts, excepting those which were subsisting at the time of his death. There is yet another consideration, not unimportant to be brought under review. It is, that the whole business of the firm is to be conducted by Cawood alone, and that neither the executor nor the legatees are authorized to interfere with or to scrutinize his transactions. Such an unlimited power over his whole assets by a person wholly unconnected with the administration of his estate could scarcely be presumed to be within the intention of any prudent testator. If to all these we add the manifest inconveniences of such an interpretation of the codicil, thus suspending for an indefinite time the settlement of the estate and the payment of the legacies, it is not too much to say, that no court of justice ought upon principle to favor, much less to adopt it.

And, certainly, there is no authority to support it; at least none, except *Hankey v. Hammock*, which cannot now, for the reasons already stated, be deemed any authority whatsoever. On the other hand, the case *Ex parte Garland*, 10 Ves. 110, and *Ex parte Richardson*, 3 Madd. Rep. 138, although distinguishable from the present

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in * some of their circumstances, were reasoned out and [* 581 , supported upon the broad and general principle that the assets of the testator were in no case bound for the debts contracted after his death by the persons whom he had authorized to continue his trade, but the rights of such new creditors were exclusively confined to the funds embarked in the trade and to the personal responsibility of the party who continued it, whether as trustee, or as executor, or as partner; unless, indeed, the testator had otherwise positively and expressly bound his general assets. The case of *Pitkin v. Pitkin*, 7 Conn. 307, is however, (as has been already suggested,) directly in point. There, the testator, by his will, directed "that all his interest and concern in the hat manufacturing business, &c., as then conducted under said firm, should be continued to operate in the same connection for the term of four years after his decease, &c." The court there held, after referring to the cases in 10 Ves. 110, and 3 Madd. Rep. 138, that the general assets of the testator were not liable to the claims of any creditors of the firm who became such after the testator's death; and that such creditors had no lien on the estate in the hands of the devisees under the will, although they might eventually participate in the profits of the trade. There was another point decided in that case, upon which we wish to be understood as expressing no opinion.

Upon the whole, our opinion is, that the decree of the circuit court, dismissing the bill, ought to be affirmed with costs.

SALLY LADIGA, Plaintiff in Error, v. RICARD DE MARCUS ROLAND, and
PETER HIEFNER, Defendants.

2 H. 581.

Under the treaty between the United States and the Creek tribe of Indians of March 24, 1832, (7 Stats. at Large, 366,) it was *Held*: 1. That the twenty sections of land to be selected by the President for the orphan children of the tribe, were not to be taken from the lands reserved for the tribe by the preceding stipulations of the treaty. 2. That a grandmother, with whom some of her grandchildren resided, was the head of a family, and entitled to a half section of land, as such.

ERROR to the supreme court of the State of Alabama, in an action of trespass *quare clausum*. Both parties claimed title under the provisions of the treaty of Washington, of March 24, 1832, between the United States and the Creek tribe of Indians; the plaintiff in error, under the second article of the treaty, as the head of a family, and the defendants as purchasers under a sale of selections of lands made by the President for the orphan children of the Creeks, pursuant to another clause of the same article.

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The material articles of the treaty are as follows:—

[* 582] “ Art. I. The Creek tribe of Indians cede to the United States all their lands east of the Mississippi River.

“ Art. II. The United States engage to survey the said land as soon as the same can be conveniently done, after the ratification of this treaty, and when the same is surveyed to allow ninety principal chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in one body in a proper form. And twenty selections shall be selected, under the direction of the President for the orphan children of the Creeks, and divided and retained or sold for their benefit as the President may direct. Provided, however, that no selection or locations under this treaty shall be so made as to include the agency reserve.

“ Art. III. These tracts may be conveyed by the persons selecting the same, to any other persons for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall [* 583] not be * valid till the President approves the same. A title shall be given by the United States on the completion of the payment.

“ Art. IV. At the end of five years all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee-simple from the United States.

“ Art. V. All intruders upon the country hereby ceded, shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting, however, from this provision, those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from the selections for the term of five years from the ratification of this treaty, or until the same are conveyed to white persons.

“ Art. VI. Twenty-nine sections, in addition to the foregoing, may

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be located, and patents for the same shall then issue to those persons, being Creeks, to whom the same may be assigned by the Creek tribe.

“ Art. XV. This treaty shall be obligatory to the contracting parties, as soon as the same shall be ratified by the United States.”

The material facts and the instructions and refusals of the court were stated in substance as follows in the bill of exceptions.

* It was proved that said plaintiff, at the date of treaty [* 584] aforesaid, to wit, on the 24th of March, 1832, and long anterior to that period, and from thence to the present time, was and is the head of the Creek Indian family residing in and having an improvement upon the E half of section 2, township 14, range 8 E &c., in the district of land subject to sale at Mardisville, in the State of Alabama, which land is situate in Benton county, and is the same sued for in this action.

It was further proved that at no time was there any other Indian improvement on the said land, and that the improvement and residence of the plaintiff alone was embraced in said half section by the legal lines of survey, and that plaintiff had lived there for many years, and raised a numerous family of children.

It was further proved, by the production of the census roll taken by order of the government of the United States, of the heads of families of the Creek tribe, in conformity with the second article of the treaty aforesaid, that the plaintiff was duly enrolled by the agent of the United States charged with this duty, as one of the heads of families belonging to the said Creek tribe, and as entitled to land under said treaty, her identity being shown by the witnesses.

That in 1834, the government, by agents charged with this duty, located the Indians. That the formula of location, as practised by said agent, consisted in calling the Indians belonging to the respective Indian towns together, and, in the presence of the chiefs and head men in the town, the agent would call over the names registered by the enrolling agent as being the heads of families in that town. That the persons whose names were so registered would appear and answer to their names, and their identity and residence, and also their improvements, would be proved, &c., pointed out by the chiefs and head men so assembled; and the agent would then designate by figures and letters, the land opposite the name of each reservee * on said census roll, to which he supposed them [* 585] entitled under the treaty.

That, upon the agent coming into the Tallasahatchee town of Indians, for the purpose of making the locations aforesaid, the plaintiff appeared before him, and being identified as the same whose name was enrolled on the census list of said town, claimed the land

in dispute, on which her improvement, at the date of the treaty aforesaid was situated, and which she then informed him she had selected as her reservation, there being no other improvement, location, or conflicting claim thereto at that time. That the deputy locating agent, who located the town to which she belonged, not regarding her the head of a family, by reason of her children having married and left her, and none but orphan grandchildren residing with her, refused to recognize her rights under the treaty, or set apart the land so by her selected opposite her name on the roll, as in other cases. That from the date of the treaty aforesaid, until the year 1837, she made continual and repeated applications to the government officers to assert her rights to said land, and through them to the government itself; until, in 1837, she was forced to leave the country and emigrate to Arkansas, by the armed troops in the employ and under the directions of the government. That she never had abandoned her claim, but insisted on her right under the treaty, to enforce which this action was brought. M. M. Houston, who was the locating agent, testified as to the reasons which induced him to refuse a recognition of plaintiff's right.

The defendant then introduced a patent or grant from the United States, signed by the President, Martin Van Buren, dated the 21st day of December, 1837, which, after reciting that by virtue of the treaty aforesaid of the 24th March, 1832, between the United States and Creek tribe of Indians, the United States agreed that twenty sections of land should be selected, under the direction of the President, for the orphan children of said tribe, and divided and retained or sold for their benefit, as the President might direct; and that the President, in making such selection, had included section 2, township 14, range 8 east, and divided the same into quarter sections; and said tract having been sold pursuant to instructions, Canton, Smith, and Heifner had become the purchasers of the southeast quarter of said section, which purchase had been sanctioned and approved by the President on the 3d November, 1836 — gave and

granted to said Canton, Smith, and Heifner, the said south-
[* 586] east quarter, to them their * heirs, &c., forever, as tenants in

common, and not as joint-tenants; which grant being properly attested, was read to the jury. Another patent or grant from the government of the United States, similar in all its form to that above named, and containing like recitals, bearing the same date and properly authenticated, conveying the northeast quarter of said section to Richard de Marcus Roland, was offered and read to the jury. And this being all the testimony, the plaintiff's counsel asked the court to charge the jury as follows : —

1. That if they believed from the evidence that the defendants were in possession of the land sued for at the institution of this suit, and continued to hold the same adversely, receiving the rents and profits thereof; and that if from the evidence the jury were further satisfied that the plaintiff, at the date of the treaty made and concluded at the city of Washington between the United States of America and the Creek tribe of Indians east of the Mississippi River, to wit, on the 24th day of March, 1832, was the head of a Creek Indian family, and that the United States enrolled her name under the provisions of the treaty aforesaid, requiring a census to be taken, &c., as the head of a Creek family; and that said plaintiff, before and at the time of the ratification of said treaty, and from thence until she was forced to leave the country by the United States, possessed said lands sued for, having an improvement and residence upon the same; and if the jury believe from the testimony that said plaintiff did select the said half section, including her improvement, and that such selection was so made without conflicting with the rights of any other Indian, or the rights or duties of the government reserved, secured, or prescribed by the treaty aforesaid, and if the proper officers of the government were duly notified of such selection by the said plaintiff, and that she had never forfeited her rights by a voluntary abandonment of the lands sued for, but had been compelled by force or coercion on the part of the United States, to emigrate from the country and leave the land, then the plaintiff is entitled to recover in this action.

2. The plaintiff asked the further charge — that under the second article of the said Creek treaty of the 24th March, 1832, each head of a Creek Indian family, after the land ceded by said treaty had been surveyed, was entitled to select a half section of land so as to include their improvement, if the same could be made; and if the jury believed from the proof that the plaintiff was the head of a Creek family, and entitled to a selection under the treaty, and that * after such survey she could select, and did select, the half [* 587] section in dispute, and in a reasonable time notified the government of such selection, and had never voluntarily abandoned said land; then plaintiff in such case acquired a vested right to said land inchoate, but sufficient under the laws of this State, coupled with possession, to maintain this action, and that such right could not be defeated by the subsequent disposition of the same by the United States to the defendants.

3. The plaintiff asked the court further to charge the jury: that if the plaintiff was entitled to select a half section of land, under the treaty aforesaid, as the head of a Creek family, duly enrolled as such,

and the selection could have been so made, and was so made, as to include her improvement within the selection; that in such case the treaty itself located the plaintiff; and if the government, with a knowledge of such selection and location, exposed the land to sale, or reserved it for other purposes, such sale or disposition could not prejudice the right of the plaintiff. All which charges the court refused to give, and in lieu of them charged the jury: that notwithstanding the plaintiff was the head of a Creek family, duly enrolled as such by the authorized agent of the government, and entitled to select a half section under the second article of the treaty of the 24th March, 1832; and that although after the land ceded by the treaty aforesaid had been surveyed, she could have selected, and did select, the half section in dispute, which included her improvement, and of which selection she duly notified the government; yet the refusal of the locating agent to recognize her right, and to set apart the land by a designation of it opposite her name upon the roll, as in other cases of location, coupled with the subsequent sale and grants of the same land to the defendants by the United States, whether right or wrong, divested the plaintiff of all right to said land, and vested in the defendants in this action titles paramount, which the plaintiff could not gainsay or dispute. To which refusals of the court to give the charges asked by the plaintiff, and to the charge given in lieu of them by the court, the plaintiff excepted, and the judgment of the county court having been affirmed by the supreme court of Alabama, this writ of error was brought.

Coxe, for the plaintiff in error.

No counsel *contra*.

[* 588] * BALDWIN, J., delivered the opinion of the court

Both parties claim the land in controversy under the United States, in virtue of the treaty of Washington, made on the 24th March, 1832, between the United States and the chiefs of the Creek tribe of Indians. The decision of the supreme court of Alabama was against the title set up by the plaintiff, the case is therefore properly brought here under the 25th section of the Judiciary Act of 1789.¹ [The articles of the treaty are set forth in the statement of the case, *ante*, p. 212.] By an inspection of the second article, it will be seen that there are three distinct classes of selections to be made from the ceded lands, for the benefit of the Indians, after the lands are surveyed.

¹ 1 Stats. at Large, 85.

1. The United States engage to allow ninety principal chiefs to select one section each.

2. And every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census is to be taken of these persons, and the selections are to include the improvements of each person within his selection.

3. And twenty sections shall be selected under the direction of the President, for the orphan children of the Creeks, and divided, retained, or sold, for their benefit, as he may direct.

By article third, these tracts may be sold by the persons selecting them, to any persons, as the President may direct, and a title shall be given by the United States, on the completion of the payment of the consideration. The fourth article stipulates, that at the end of five years, those entitled to these selections, who are desirous of remaining, shall receive patents; and by article fifth, all intruders shall be removed from these selections, for five years after the treaty, or until the same are conveyed to white persons. By article sixth, twenty-nine sections more may be located, and patents shall issue to the Creeks to whom the same may be assigned by the tribe. The fifteenth article makes the treaty obligatory on the parties, when ratified by the United States.

* The engagements of the treaty then are, to allow the [* 589] chiefs and heads of families to select, for their own use, and reserve from sale for five years, the lands selected, that they may be sold and conveyed with the approbation of the President, and titles to be given by the United States, on payment of the purchase-money, and at the end of five years to give patents to all who are entitled to select and desirous of remaining, and to remove intruders from their selections, during that time, till they are conveyed to white persons.

The lands to be selected for the orphans are placed under the exclusive direction of the President, as to their location and disposition, and are not embraced in the third or fourth articles, which are confined to selections made by the Indians themselves; these are expressly reserved from sale for five years, whereas the selections for orphans may be made and the lands sold at any time the President directs.

No authority is given to the President to direct the selection of the twenty sections for orphans, on or out of those made by the chiefs or the heads of families, or those sections which the tribes may assign under the sixth article; all the lands so selected or located are placed beyond the power of any officer, consistently with

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the obligatory engagements of the treaty on the United States. In directing the selections for orphans, the treaty did not intend, and cannot admit of the construction, that they might be made on lands selected according to the first part of the second article. The provisions of the treaty were progressive; that relating to orphans is entirely prospective. "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forward, not backward; and are never to be construed retrospectively, unless the language of the act should render that indispensable. No words are found in the act which renders this odious construction indispensable." 2 Pet. 434. The last clause in this article cannot have been intended to annul or impair a title which was valid under the first clause, and guaranteed from intrusion under the fifth article for five years, unless sooner sold. S. P. 9 Wheat. 479.

Thus taking the treaty, and applying it to the evidence given at the trial, the instructions prayed of the court, and those given to the jury, it will not be difficult to decide in which party is the right of this case.

The plaintiff "proved substantially the following facts." [For the facts proved upon the trial, see the statement of the reporter.]

From the evidence, it appears that the plaintiff claimed [* 590] under the * first, and the defendants under the second clause of the second article of the treaty; that the plaintiff was the head of a family within the description, and had complied with all the requisites of the treaty, had selected the tract whereon her improvements were, where she resided before, at the time of the treaty, and until her expulsion therefrom by military force, on the frivolous pretence that she was not the head of a family, her children having married and left her, and none but her grandchildren lived with her. The defendants claimed under the second clause of the second article, relating to orphans' selections, by two patents dated in 1837, each for a quarter section, being the two halves of the half section selected by the plaintiff, which patents issued pursuant to a sale made by the agent appointed by the President, and affirmed by him in November, 1836, five months before the expiration of five years from the ratification of the treaty, and while the land was expressly reserved from sale. The defendants gave no other evidence of title.

This sale was a direct infraction of the solemn engagements of the United States in the treaty. Though approved by the President, if the plaintiff had previously selected it according to the stipulations of the treaty, in such case the sale was a nullity, for the want of any

power in the treaty to make it. The President could give no such power, or authorize the officers of the land-office to issue patents on such sales; they are as void as the sales, by reason of their collision with the treaty. The only remaining inquiry is into the plaintiff's title. No other objection has been made to it, than the refusal of the locating agent or his deputy to recognize her right under the treaty, or to set apart the land so located by her opposite her name on the roll, as in other cases, solely for the reason he assigned. We cannot seriously discuss the question, whether a grandmother and her grandchildren compose a family, in the meaning of that word in the treaty; it must shock the common sense of all mankind even to doubt it. It is as incompatible with the good faith and honor of the United States, and as repugnant to the Indian character, to suppose that either party to the treaty could contemplate such a construction to their solemn compact, as to exclude such persons from its protection, and authorize any officer to force her from her home into the wilds of the far west. Such an exercise of power is not warranted by the compact, and the pretext on which it was exercised is wholly unsanctioned by any principle of law or justice.

Having a right by the treaty to select the land of her residence; * having selected and been driven from it by [* 591] lawless forces, her title remains unimpaired. She has not slept on her rights, but from 1832 to 1837 has made continuous and repeated applications to the government officers to assert her rights to said land, and through them to the government itself in 1837. She has never abandoned her claim, but has insisted on her rights under the treaty.

In our opinion, the plaintiff not only has a right to the land in question under the treaty, but one which it protects and guarantees against all the acts which have been done to her prejudice; and we are much gratified to find in the able and sound opinion of the supreme court of Tennessee, on the Cherokee treaty of 1819,¹ and the supreme court of Alabama on this treaty, a train of reasoning and conclusions which we very much approve, and are perfectly in accordance with our opinion in this case. These cases are reported in 2 Yerger, 144, 432; 5 Yerger, 323; 5 Porter, Alabama, 330, 427.

The judgment of the supreme court of Alabama is therefore reversed.

¹ 7 Stats. at Large, 195.

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Lessee of JOHN POLLARD, WILLIAM POLLARD, JOHN FOWLER, and HARRIET his Wife, HENRY P. ENSIGN and PHEBE his Wife, GEORGE HUGGINS and LOUISA his Wife, JOSEPH CASE and ELIZA his Wife, Plaintiff in Error, v. JOSEPH F. FILES, Defendant.

2 H. 591.

It is the settled doctrine of this court, that the country west of the Perdido River was not acquired from Spain as part of West Florida.

But though we hold the Spanish authorities could not make valid titles to lands there, after the acquisition of Louisiana by the United States, yet incipient titles acquired from these authorities might be, and to some extent have been, respected and confirmed by the United States; and such a title of the plaintiff in error, existing when the act of congress of 1824, (4 Stats. at Large, 66.) granted certain lands to the city of Mobile, it was within the exceptions of that act; and the subsequent confirmation, by congress, of the plaintiff's title, made it valid.

ERROR to the supreme court of the State of Alabama, in an action of ejectment brought by the plaintiff in error. The material facts appear in the bills of exceptions, which were in substance as follows:—

[* 594] * The plaintiffs gave in evidence a Spanish grant, of which the following is a translation:—

Mr. Commandant: William Pollard, an inhabitant of this district, before you, with all respect represents: That he has a mill established upon his plantation, and that he often comes to this place with planks and property from it, and that he wishes to have a place propitious or suitable for the landing and safety thereof; and that, having found a vacant piece at the river side, between the canal which is called John Forbes and Company's and the wharf at this place, he petitions you to grant him said lot on the river bank, to give more facility to his trading; a favor he hopes to obtain of you.

Mobile, 11th December, 1809.

WILLIAM POLLARD.

Mobile, 12th December, 1809.

I grant the petition; the lot or piece of ground he prays for, on the river bank, provided it be vacant.

CAYETANO PEREZ.

They relied also upon an act of congress for the relief of William Pollard's heirs,¹ and a patent, issued in pursuance thereof, under date of March 14, 1837.

The plaintiff then gave in evidence that the premises [* 595] sued for * were situated between Church street and North Boundary street, and immediately in front of lots known under the Spanish government as water lots, and that the said lot

¹ 6 Stats. at Large, 680.

now sued for was, in the year one thousand eight hundred and twenty-four, and is now, known as a water lot; that it lies on the east side of Water street; that what is now Water street was, under the Spanish government, and at the date of the grant to Forbes and Company, hereafter attached, a natural ridge, and that the ordinary tides did not overflow said ridge, and very high tides entirely covered said ridge; that to the north of the lots lying immediately west of the lot sued for, near Conti street, there was a depression in said ridge, where the water, at high tide, flowed around upon the eastern part of the lots lying, as before stated, immediately west of the lot sued for, and which were known as water lots under the Spanish government.

The plaintiffs then gave in evidence that John Forbes and Company applied for and obtained permission from the Spanish government, to open or cut the canal which was called John Forbes and Company's canal, after they had obtained a grant for the lot lying immediately west of said canal.

The defendant, in order to maintain the issue on his part, gave in evidence a Spanish grant to John Forbes and Company, for a lot of ground eighty feet front on Royal street, with a depth of three hundred and four feet to the east, which is hereto attached and marked A, together with the plat or survey thereto attached, which is made part of this bill of exceptions; and proved that the said lot was situated immediately west of the lot sued for, and was separated from it now only by Water street; but that Water street was not known at the date of this grant, and that said street was laid off in 1820 and 1821. The defendant further gave in evidence a certificate of confirmation for the said lot to John Forbes and Company, who were the successors of Panton, Leslie, and Company, the original grantees, which is also made a part of this bill of exceptions, and marked B, by which it will appear that three hundred and four feet were confirmed to Forbes and Company.

The defendant also proved that one Curtis Lewis, some time in 1822 or 1823, sunk some flat boats in the canal called Forbes and Company's, and proceeded to fill up the lots now sued for; but that one James Inerarily, one of the firm of Forbes and Company, dispossessed him in the night, and erected a smith's shop, and continued in possession about nine months, when Curtis Lewis regained possession by writ of forcible entry and detainer.

* It further appeared in evidence that the ridge in Water [* 596] street was about fifteen or twenty feet in width, and that it was covered by the ordinary tides for about one third of its width, up to the year 1822, and that all the land east of Water street, as

at present laid out, up to 1813, was below the ordinary high-water mark. It further appeared that the firm of Forbes and Company entered upon the lot granted to them as aforesaid, and made valuable improvements on it, and fulfilled the conditions of the grant, and on the 25th of May, 1824, held the land to the west of Water street without dispute.

It further appeared that the first improvements on the lot east of Water street were made by Curtis Lewis, except the canal and improvements along it, of John Forbes and Company; but it was also in evidence that, in 1811, a witness had seen the servants of William Pollard removing some drift wood and piling some lumber on the lot in question.

The defendant then connected himself with the title of Curtis Lewis, Forbes, and Company, and the corporation of the city of Mobile, which claimed the same by virtue of the act of 1824, above referred to.

Whereupon the plaintiffs, by their counsel, prayed the court to charge the jury, First, that the said Spanish grant made to William Pollard was ratified and confirmed by the 8th article [* 597] * of the treaty of amity, settlements, and limits, between the United States and his Catholic majesty, dated 22d February, 1819;¹ which charge the court refused to give; to which the plaintiffs, by their counsel excepted.

The plaintiffs then, by their counsel, prayed the court to charge the jury that the act of congress of July 2, 1836, confirmed the said Spanish grant to Pollard, which charge the court refused to give, but on the contrary, charged the jury, if they believed the evidence to be true, the fee-simple to the premises sued for were vested in Forbes and Company, and that the acts of congress of 1824 and 1836, and the patent in pursuance thereof, were utterly void, so far as relates to the premises in question, and that no title vested in the lessors of plaintiff by virtue of said acts of congress and said patent, to which charge the plaintiffs excepted.

This opinion of the court was affirmed by the supreme court of the State of Alabama.

Coxe, for the plaintiff in error.

Sergeant, for the defendant.

[* 601] * CATRON, J., delivered the opinion of the court.

For the facts of the case, we refer to the report of it. It presents * the same titles, and, substantially, the same facts, [* 602] that were before this court in *Pollard's Heirs v. Kibbe*, 14 Pet. 353.

The first instruction asked by the plaintiff of the state circuit court is, that the Spanish grant made to William Pollard was ratified and confirmed by the 8th article of the treaty with Spain of 1819, by which the Floridas were acquired. This the court refused to give, and correctly.

It is the settled doctrine of the judicial department of this government, that the treaty of 1819 ceded no territory west of the River Perdido, but only that east of it; and therefore all grants made by Spain after the United States acquired the country from France, in 1803, are void, if the lands granted lay west of that river; because made on territory acquired by the treaty¹ of 1803, which extended to the Perdido east. It was thus held in *Foster and Elam v. Neilson*, 2 Pet. 253, and again in *Garcia v. Lee*, 12 Pet. 515, and is not now open to controversy in this court.

2. The plaintiffs then, by their counsel, prayed the court to charge the jury that the act of congress of July 2, 1836, confirmed the said Spanish grant to Pollard, which charge the court refused to give, but, on the contrary, charged the jury, if they believed the evidence to be true, the fee-simple to the premises sued for were vested in Forbes and Company, and that the act of congress of 1824 and 1836, and the patent issued in pursuance thereof, were utterly void, so far as relates to the premises in question, and that no title vested in the lessors of plaintiff by virtue of said acts of congress and said patent; to which charge the plaintiffs excepted.

The questions raised by the instruction asked and refused; and by that given, will be examined so far only as to decide the present case.

This court held, when Pollard's title was before it, formerly, that congress had the power to grant the land to him by the act of 1836; on this point there was no difference of opinion at that time among the judges. The difference to which the supreme court of Alabama, in the present case refers, (in its opinion in the record,) grew out of the construction given by a majority of the court to the act of 1824, by which the vacant lands east of Water street, were granted to the city of Mobile. That grant excepted out of it, all lots to which "the Spanish government had made a new grant, or order of survey for the same, during the time at which they had the power to grant the same."

¹ 8 *Stats. at Large*, 200.

If Pollard's was such "a new grant," then the land [* 603] * covered by it was excepted, and did not pass to the city and the act of 1836, and the patent founded on it, passed the title to Pollard.

After the country west of the Perdido had been acquired by the treaty of 1803, the Spanish government continued to exercise jurisdiction over the country, including the city of Mobile, for some nine years; the United States not seeing proper to take possession, and Spain refusing to surrender it, on the assumption that the country had not been ceded by that kingdom to France in the treaty of 1800; and, of course, that it did not pass to this country by our treaty with France. That Spain had no power to grant the soil, during the time she thus wrongfully held the possession, is settled by the cases cited of *Foster and Elam v. Neilson*, and *Garcia v. Lee*. But the right necessarily incident to the exercise of jurisdiction over the country and people, rendered it proper that permits to settle and improve, by cultivation, or to authorize the erection of establishments for mechanical purposes, should be granted. And to this end the concession to Pollard, of December, 1809, was made. He set forth in his petition to the commandant, that he had a mill established on his plantation, and often came to Mobile with planks and property from it, and that he wished a place propitious and suitable for the landing and safety thereof; and, having found a vacant piece at the river side, between the canal of Forbes and Company and the public wharf, he solicits the commandant to grant him said lot on the river bank, to give more facility to his trading. This lot, the governor granted to Pollard for the purpose set forth by him.

The use, for the purpose solicited, during the time the Spanish authorities were exercised, could be properly granted; of this there can be no doubt.

Very many permits to settle on the public domain and cultivate were also granted about the same time; which were in form incipient concessions of the land, and intended by the governor to give title, and to receive confirmation afterwards from the king's deputy, so as to perfect them into a complete title. Pollard's was also of this description. Although the United States disavowed that any right to the soil passed by such concessions, still, they were not disregarded as giving no equity to the claimant; on the contrary, the first act of congress, passed (of April 25, 1812,¹) after we got possession of the country, appointed a commissioner to report to congress on them in common with all others originating before the treaty of 1803

¹ 2 Stats. at Large, 713.

took effect. The 3d section orders all persons, claiming lands in 'the previously disputed territory "by virtue of any [* 604] grant, order of survey, or other evidence of claim, whatsoever derived from the French, British, or Spanish governments, to be laid before the commissioner, with a notice in writing, stating the nature, &c., of the claim." On these, (by sect. 5,) the commissioner had power given him to inquire into the justice and validity of the claims; and in every case it was his duty to ascertain whether the lands claimed had been inhabited and cultivated; at what time the inhabitation and cultivation commenced; when surveyed and by whom and by what authority, and into every matter affecting their justice and validity.

By sect. 6, abstracts were to be furnished to the secretary of the treasury, of the claims, arranged in classes, according to their respective merits, and these abstracts, &c., were to be laid before congress, for their determination thereon, &c.

By sect. 8, the commissioner was ordered to report to congress at its next session, a list of all actual settlers on the land in his district, who had no claims derived from either the French, British, or Spanish governments, and the time such settlements were made.

In January, 1816, the report of commissioner (Crawford) was laid before congress. 3 Am. State Papers, 6, "Public Lands."

The 14th section of the act of March 26, 1804,¹ declares all grants void if made for lands within the territories ceded by the French republic to the United States, by the treaty of the 13th of April, 1803, (and which had been acquired by France from Spain,) that had been made after the date above. Provided, that the law should not be construed to make void any *bonâ fide* grant made by the Spanish government, to an actual settler on the lands granted, for himself, and for his wife and family, &c. On Pollard's claim the commissioner reported unfavorably, because it had "not been inhabited nor cultivated." 3 State Papers, 18. The bill of exceptions refers to this report as it stands in the book, as part of the bill of exceptions, and as such it is treated by us.

In April, 1818, by a resolution of the senate, it was referred to the secretary of the treasury to furnish a plan, for an adjustment of the claims reported on by the commissioners east and west of Pearl River; and on the 7th of December, 1818, the secretary made his report in the form of a bill. 3 State Papers, 391. On all the imperfect claims favorably reported on by the commissioners, derived from * the authorities of Spain before the 20th of December, 1803, [* 605] a confirmation was recommended. And the land that had

¹ 2 Stats. at Large, 287.

been cultivated on or before that day, should be confirmed also, as if the titles had been completed. And as to all the other claims favorably recommended to congress by the commissioners, the claimant should be entitled to a grant therefor, as a donation, not to exceed to any one person more than 640 acres; that all settlers before the 15th of April, 1813, should receive a grant for the land claimed, not exceeding 640 acres, if actually inhabited and cultivated.

On this report the act of March 3, 1819,¹ was founded, and by sect. 2, each settler with title papers, had confirmed to him his habitation as a donation, not to exceed 1,280 acres, and this irrespective of the time when the settlement was made, if previous to the 15th of April, 1813; but the grant not to exceed 640 acres to such settlers as had presented no written evidences of title.

By the 7th, 8th, and 9th sections, those who had filed their notices of claim before the commissioner, and which had not been recommended for confirmation, were allowed to the 1st of July, 1820, to file additional evidence in support of the claim with the register and receiver, of the land-offices respectively established by that act, in the country divided by Pearl River, who had the same powers conferred on them that the commissioner previously had. New claims might also be filed. On these the register and receiver were to report; of course, after the 20th of July, 1820. The land-office for the country including Mobile was at Jackson court house. Thus the matter stood for eight years.

By the act of March 3d, 1827,² further time was given to the 1st of September, 1827, to claimants whose evidences of claim had been previously filed with the commissioner, to produce further evidence, and "to present their titles and claims, and the evidence in support of the same, to the register and receiver of the land-office at St. Stevens." By sect. 2, they were ordered to hold their sessions at the city of Mobile, and there examine the suspended claims on the same principles the commissioner had done.

Thus suspended and protected, stood the title of Pollard when the act of 1824 was passed granting to the city of Mobile the river front. And from any thing appearing to the contrary, it [* 606] stood equally *protected until confirmed by the act of 1836.

It was for the sovereign power to judge of its merits; it had never been rejected, and was awaiting the final action of congress. Furthermore, it was from its situation as a city lot not subject to entry in a land-office, being in no survey of the public lands; and it is a fair construction of the exception to the act of 1824, to hold that Pollard's claim was intended to be within the following

¹ 3 Stats. at Large, 528.

² 4 Ib. 239.

exception, as well as the one commented on in *Pollard v. Kibbe*, 14 Pet. 353. That is: "Provided, that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual, or of any body politic or corporate."

We think Pollard's was a claim of an individual within the exception, and was so deemed by congress; as the United States, by the 1st section, only profess to grant their right to the city front, and except all lots confirmed by congress by that, or any previous act, and also such "to which an equitable title existed in favor of any individual under this, or any former act." Then, in the 2d section, the provision examined in the case of *Pollard v. Kibbe*, has direct reference to protection by excepting lots, "to which the Spanish government had made a new grant or order of survey," &c. It is obvious the previous obscurity and confusion were intended to be explained by the proviso; simply expressed, that nothing which preceded should affect any individual claim, regardless of the fact whether it was good or bad, so it was a recognized claim by the United States. That Pollard's was so, is most apparent by the protection afforded to it; and such is the unanimous opinion of this court, for the reasons formerly and now given, taken together.

Pollard's patent is therefore valid, unless the second instruction given be true, that the act of congress of 1836, and the patent founded on it be void, as relates to the subject in controversy; and therefore the lessors of the plaintiff derived no title from these sources, because the fee-simple of the premises was in John Forbes and Company, when Pollard took his title.

It was held in the *City of Mobile v. Eslava*, 16 Pet. 247, that the improvements referred to in the act of 1824, by virtue of which a title was given to the owner of the old water lot west of Water street, to the lot immediately east of it, must have been made on the new and eastern water lot. 2. That such improvement must have been made by the proprietor of the old lot.

* Forbes and Company had no such improvement, and [* 607] therefore took no benefit under the act of 1824.

If the instruction intended to maintain that Forbes and Company, as riparian proprietors of the lot west of Water street, could claim all the land east of it, to the channel of the river, then we think the court erred; and we take it for granted the court so intended; as by no other means could the land sued for be claimed by Forbes and Company from any evidence in the record. Their lot was a grant of 1802, for 80 feet front, by 304 feet deep, west of what is now Water street; and bounded on the east by the street as it now exists. High tide formerly reached it; low tide did not. But we deem this an

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immaterial circumstance. Forbes and Company's grant was a specific town lot bounded by streets, then existing or expected to exist; it fronted to the east on a contemplated street, reserved to the public use, as ungranted property; and it never was contemplated by the grant to give any right to the soil beyond its fixed boundary east, as actually surveyed. It does conform, and must conform, to the city arrangement of lots; if it was held otherwise, then every other proprietor of an old front lot could claim over the mud-flat to the channel of the river, as a riparian owner; sweeping through the city property as it now exists by filling up, and raising the flat, to the extent east of probably a thousand feet or more. We deem such an assumption entirely inadmissible; and therefore think the court also erred in the second instruction given, as well as in refusing that asked on the part of the plaintiffs.

With the third instruction this court cannot interfere; and the jury having found for the defendant, no question arises on the fourth instruction.

For the reasons assigned, we order the judgment of the supreme court of Alabama to be reversed.

3 H. 32, 212.

JOHN L. MCCrackEN, Plaintiff in Error, v. CHARLES HAYWARD.

2 H. 608.

A state law, which prohibits property from being sold on execution for less than two thirds the valuation made by appraisers, pursuant to the directions contained in the law, impairs the obligation of contracts, and is inoperative upon executions issuing on judgments founded on contract.

The authority conferred on the courts of the United States by the act of May 19, 1828, (4 Stats. at Large, 278,) to alter final process so as to conform it to any change which may be made in the laws of the States, does not empower the courts to adopt a state law in part, or with modifications; it must be adopted as enacted, if at all.

CERTIFICATE of division of opinion of the judges of the circuit court of the United States for the district of Illinois.

The case is stated in the opinion of the court. The law of the State, and the rule of court referred to were as follows:—

In February, 1841, the State of Illinois passed the following law:

“ An act regulating the sale of property.

“ Sect. 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, 'That, when any execution shall be issued out of any of the courts of this State, whether of record or not, and shall be levied on any real or personal property, or both, it shall be the duty of the officer levying such execution, to summon

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three householders of the proper county, one of whom shall be chosen by such officer, one by the plaintiff, and one by the defendant in the execution; or, in default of the parties making such choice, the officer shall choose for them; which householders, after being duly sworn by such officer so to do, shall fairly and impartially value the property upon which such execution is levied, having reference to its cash value, and they shall indorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property shall be offered for sale, it shall not be struck off unless two thirds of the amount of such valuation shall be bid therefor: Provided, always, that the plaintiff in any execution issued from any court of record of this State, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken in execution. And in all other executions issued from any of the courts of this State not being courts of record, the plaintiff in execution may elect on what personal property he will have the same levied; excepting and reserving, however, to the [* 609] defendant in execution, in all cases, such an amount and quantity of property as is now exempt from execution by the laws of this State: And provided, further, that all sales of mortgaged property shall be made according to the provisions of this act, whether the foreclosure of said mortgage be by judgment at law, or decree in chancery. The provisions of this act shall extend to judgments rendered prior to the first day of May, eighteen hundred and forty-one, and to all judgments that may be rendered on any contract or course of action accruing prior to the first day of May, eighteen hundred and forty-one, and not to any other judgments than as before specified.

“ Sect. 2. When any property shall be levied on and appraised in the manner required by this act, and the same shall be susceptible of a division, no greater quantity thereof than will be sufficient to pay the amount of the execution or executions thereon levied, together with the proper costs, at two thirds of the valuation thereof, shall be offered for sale by the officer in whose hands such execution or executions may have been placed for collection.

“ Sect. 3. This act shall be in force from and after its passage, and the secretary of state is hereby required to have a thousand copies thereof printed immediately after its approval, and transmit them to the clerks of the county commissioners' courts of the several counties in this State for distribution among the proper officers thereof. Approved, February 27, 1841.”

In June, 1841, the circuit court of the United States adopted the following rule: —

“ When the marshal shall levy an execution upon real estate, he shall have it appraised and sold under the provisions of the law of this State, entitled: ‘ An act regulating the sale of property,’ approved 27th February, 1841, if the case come within the provisions of that law; and any two of the three householders selected under the law agreeing, may make the valuation of the premises required.”

Isaac N. Arnold, for the plaintiff.

No counsel *contra*.

[* 611] * BALDWIN, J., delivered the opinion of the court.

It appears from the record in this case, that the plaintiff obtained a judgment against the defendant, in June, 1840, on which a *pluries fi. fa.* issued at May term, 1842; real property was levied on; appraised according to the provisions of a law of Illinois, passed on the 27th February, 1841, and the rule of the circuit court of that State, adopted in June of the same year, which law and rule are inserted in the statement of the case by the reporter.

The property levied on was advertised for sale by the marshal, in August, 1842, but was not sold, as no one bid two thirds of the appraised value. In March, 1843, the plaintiff sued out a *renditioni exponas*, with directions to the marshal to sell the property, regardless of the state law, which the marshal refused to obey, conceiving himself bound by the aforesaid rule of court. Whereupon the plaintiff moved the court for an order directing the marshal to sell to the highest bidder, without valuation, or any regard to the state law.

“ 1. The plaintiff, by Arnold, his attorney, comes and moves the court to set aside the return of the *pluries* execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two thirds of appraised value.

“ 2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having valued it again.

[* 612] * “ 3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment, and the making of the contract between the parties.

“ 4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the act of February, 1841, of the legislature of Illinois, and of January, 1843, regulating the sale of property above referred to.”

On the argument of this motion, the court were divided in opinion on the points mentioned in the statement. These questions must be considered in two aspects; 1. In reference to the constitution. 2. The laws of the United States, as the tests of the validity of the law of Illinois and the rule of court, which, it is said, affect only the remedy, but not the right of the plaintiff arising on the contract between the parties, and the judgment rendered upon it.

In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.

* This principle is so clearly stated and fully settled in the [* 613] case of *Bronson v. Kinzie*, decided at the last term, 1 How.

311, that nothing remains to be added to the reasoning of the court, or requires a reference to any other authority, than what is therein referred to; it is, however, not to be understood that by that, or any former decision of this court, all state legislation on existing contracts is repugnant to the constitution.

“ It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts; such,

too, is the power to pass acts of limitation, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law may be so unreasonable as to amount to the denial of a right, and call for the interposition of the court." 3 Pet. 290.

The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms

or law of the contract. Any subsequent law which denies, [*614] * obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three fourths, or nine tenths, as well as for two thirds; for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff. This was the ruling principle of the case of *Bronson v. Kinzie*, 1 How. 311, which arose on a mortgage containing a covenant, that, in default of payment, the mortgagee might enter upon, sell, and convey the mortgaged premises, as the attorney of the mortgagor; yet the case was not decided on the effect and obligation of that covenant,

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but on the broad and general principle, that a state law, which professedly provided a remedy for enforcing the contract of mortgage, effectually impaired the rights incident to, and attached to it by the laws in force at its date, was void. No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts; the express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal, to sell and convey the property levied on, under an execution. He is the constituted agent of the defendant, invested with all his powers for these purposes. The marshal can do under the authority of the law whatever he could do under the fullest power of attorney from the execution debtor; and no state law can prohibit it. It follows that the law of Illinois now under consideration, so far as it prohibits a sale for less than two thirds of the appraised value of the property levied on, is unconstitutional and void.

The second aspect in which this case must be considered, is with reference to the acts of congress relating to process and proceedings in the courts of the United States in cases at common law. All the early laws on this subject were carefully and most ably reviewed by this court, in *Wayman and Southard*, and *The Bank of the United States v. Halstead*, in which it was held that the proceedings in the *courts of the United States should be the same as [* 615] they were in the several States at the time of passing the acts of congress, subject to be altered by the circuit courts, or regulations of the supreme court. That the proceedings on executions were to be governed by such laws until final satisfaction was obtained, regardless of any subsequent changes by state legislation. 10 Wheat. 20, 51.

Prior to 1828, congress had passed no process acts applicable to the States admitted into the Union after 1789. To remedy this defect, and to confirm the decisions in the above cases, the act of May, 1828, directed that writs of execution and other final process issued on judgments and decrees, and the proceedings thereupon, shall be the same in each State as are now used in the courts of such State, &c.; thus adopting the same principles which had been established by this court in the construction of the acts of 1789¹ and 1792.² Consequently, no state law passed since May, 1828, can have any effect on the proceedings on executions issued from the courts of the United States, unless such laws are adopted by those courts under the proviso in the third section of the act.

¹ 1 Stat. at Large, 93.² *Ib.* 275.

The rule adopted by the circuit court of Illinois does not fall within this proviso, which declares, "that it shall be in the power of the courts, if they see fit in their discretion, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the state courts."

This authorizes the court to adopt the change so made by a state law, but not to adopt it only in part, or alter it in any respect. The law directs the appraisement to be made by three householders, one to be selected by the defendant, one by the officer, and one by the plaintiff, without any authority to any two to make it, and, consequently, requiring the concurrence of all. The rule of court adopting this law provides: "that any two of the three householders selected under the law agreeing, may make the valuation required;" such an adoption is not warranted by the act of 1828; it is legislation in effect, by prescribing a new rule unknown to any act of congress, or the state law professedly adopted. But had the adoption been in the terms of the law, it could not be recognized, inasmuch as the appraisement therein directed, with the prohibition to sell at less than two thirds of the valuation, is repugnant to the constitution of the United States. It also conflicts with the process [* 616] acts, as construed *in *Wayman v. Southard*, and *The Bank of the United States v. Halstead*, and the repeated decisions of this court in later cases, that no state law can be adopted under the act of 1828, which is in collision with any act of congress. 16 Pet. 94, 312-314.

It must therefore be certified to the circuit court, that the motion made by the plaintiff's counsel ought to be granted, and that the directions to the marshal prayed for by the plaintiff, ought to be given in the manner stated in the second, third, fourth, and fifth points certified.

CATRON, J. The third section of the act of 1828, provides: "That writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, (except their style,) in each State, respectively, as are now used in the courts of such State."

A system of rules has been adopted in the circuit court of the Kentucky district, regulating final process, and giving a widely different effect to such process from what it had by the laws of Kentucky; a violent controversy was the consequence in that State, and which gave rise to the cases of *Wayman v. Southard*, and *United States Bank v. Halstead*, reported in 10 Wheat. 1, 51. The agitation,

it is understood, was one prominent reason for the introduction of the act of congress of 1828. It repealed all rules made by the courts of the United States regulating final process, in all the districts, and adopted the execution laws of the respective States, as they then stood; and if nothing more had been done, future legislation on the subject, by the States, would have been cut off. Congress, however, foreseeing new States might come into the Union, to which the act would not apply; and that it might be proper to adopt future state laws, in the existing States, provided, "that it should be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the state courts."

An adoption of the state law, as the legislature had made that law, is the extent of the power conferred. If the courts can alter the law in one respect, it may be altered in all respects; this is not "conformity," but an exercise of the same power the act of 1828, *prohibited. The rule before us will illustrate it. The [*617] state law of Illinois enacts that, three valuers shall determine the value of the property levied on by the sheriff; one chosen by the plaintiff; one by the defendant, and the other by the sheriff; that the three must agree in the valuation; and if the property does not bring two thirds of such valuation, it shall not be sold.

The rule provides, that if the appraisers disagree, the value fixed by any two of them shall be sufficient to authorize the marshal to sell. The debtor will naturally select one, who he supposes will set the highest value on the property; the creditor one he supposes will fix the lowest value; the marshal may be favorably disposed to the one side or the other; most probably to the absent creditor; the appraiser of his selection, and the one selected by the debtor, may agree, and usually would. This will cut out all the advantages the statute secured to the creditor, as his selection would have no effect. Take it the other way, and the operation will be the same.

If this change were sanctioned, then, in Pennsylvania and other States, where there are statutes by which lands are directed to be valued by a jury of twelve, to ascertain whether the rents and profits will pay the debt in a given number of years; in which case, the debtor is compelled to take the accruing profits in satisfaction as they arise; and if not, then the lands are to be sold to the highest bidder, could also be altered, and by a rule of court, a majority of two thirds of the jury be authorized to assess the annual income. It is manifest, if amendments and alterations can be made by the courts, of the state statutes, they must, of necessity, run into an unlimited discre-

tion, if any one feature of the state law is retained. I therefore think the rule of court, adopting the statute of Illinois, with the foregoing amendment, is merely void; and that no part of the state statute is in force in the circuit court of the United States in the district of Illinois.

And not having been adopted, it is not before this court for construction; and that it is unnecessary and improper to inquire into the constitutionality of the state law, as the laws in force in 1828 must govern. In this respect, the opinion in the case of *The United States Bank v. Halstead*, is followed, where the precise question arising in the case before us was presented, (the rule aside,) and in which this court then declined giving any opinion on the valuation

law of Kentucky. I have formed no opinion, whether the [*618] statute of Illinois is *constitutional or otherwise. The

question raised on it is one of the most delicate and difficult of any ever presented to this court; and as our decision affects the state courts throughout, in their practice, I feel unwilling to form or express any opinion on so grave a question, unless it is presented in the most undoubted form, and argued at the bar.

On the questions propounded by the certificate of division, I agree in the answers given by my brethren, because the execution is governed by the laws of Illinois as they stood at the passing of the act of congress of 1828, without going further, as I know the constitutional question will affect other States beside Illinois; many, not to say most of them have had, and some now have, valuation laws; in which no distinction is made between contracts made before the passing of the act, and those made afterwards, and that the decision against their validity as to past contracts, will reach a great way further than may be supposed on a slight examination.

5 H. 295; 6 H. 301, 507; 15 H. 304; 24 H. 461; 4 Wal. 535.

EDWARD P. GAINES and Wife v. BEVERLY CHEW, RICHARD RELF, and others.

2 H. 619.

It is not practicable to define multifariousness; each case must be examined in reference to the leading principles, not to subject one party to a litigation between others in which he has no interest, and not to allow an unnecessary multiplicity of suits.

A bill which claims different parcels of land, as devisee, or heir at law, and shows that each defendant claims in severalty as a purchaser under a will, which the bill impeaches, and the effect of which to devise any of the lands, the bill controverts, is not multifarious, though the case of each defendant who may claim protection as a *bonâ fide* purchaser without notice, is distinct from the cases of all the others.

Both under the local law of Louisiana and the chancery law as administered in the courts of the United States, when a bill has been admitted to probate, a claim that it was revoked

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by a subsequent will, and that the latter alone is operative, cannot be made, effectually, so as to set up a title under the latter will, save in a court of probate.

Perhaps under some circumstances equity may interpose to compel a party to allow the revocation of a probate and the substitution of another will by the court of probate.

But in Louisiana, in an action to try a title to land, the probate of a will may be drawn in question collaterally, by an heir at law, and if the parties are numerous and the controversy complicated, and discovery is wanted and can be had, equity would give relief, especially in a case of fraud.

Though *fidei commissum* are abolished in Louisiana, this does not prevent a court of the United States, administering equity there, from holding a wrongdoer, a trustee for the party justly entitled, by way of remedy for the wrong.

CERTIFICATE of division of opinion of the judges of the circuit court of the United States for the eastern district of Louisiana. The questions certified arose on a demurrer to a bill in equity. The substance of the bill is stated in the opinion of the court.

Henderson, Coxe, and Barton, for the demurrer.

R. Johnson and Jones, contra.

* McLEAN, J., delivered the opinion of the court. [* 640]

This case is brought before the court from the eastern district of Louisiana, by a division of the judges on certain points, which are certified under the act of congress.

The complainants in their bill state that Daniel Clark, late of the city of New Orleans, in the State of Louisiana, in the year 1813 died, seised in fee-simple, or otherwise well entitled to and lawfully possessed of, in the district aforesaid, a large estate, real and personal, consisting of plantations, slaves, debts due, and other property, all of which is described in the bill.

That the said Myra was the only legitimate child of the said Clark. That about the month of July, 1813, he made his last will and testament, according to law, and in which he devised to his daughter Myra, all his estate, real and personal, except certain bequests named. Col. Joseph Deville, Degontine Bellachasse, James Pitot, and Chevalier Dusseau de la Croix were appointed executors of the will, and the said Chevalier de la Croix was also appointed tutor to the said Myra, who was then about seven years of age. In a few days after making the will, the said Clark died.

From her birth, the said Myra was placed, by her father, in the family of Samuel B. Davis, who at the time resided in New Orleans, but in 1812 removed to Philadelphia, where the said Myra resided until her first marriage, being ignorant of her rights and her parentage.

In the year 1811, being about to make a journey to Philadelphia,

and fearing some embarrassments from a partnership transaction, the said Clark conveyed property to the said Samuel B. Davis and others, to the amount of several hundred thousand dollars to be held in trust for the use of the said Myra. And about the same time he made a will devising to his mother, then residing out of Louisiana, his property, and appointed Richard Relf and Beverly Chew, two of the defendants, his executors. That afterwards, on his return from Philadelphia, he received back a portion of the property conveyed in trust as aforesaid; and by the will of 1813 revoked that of 1811.

[* 641] * The bill charges that immediately upon the death of the said Clark, the will of 1813 came into the possession of the said Relf, who fraudulently concealed, suppressed, or destroyed the same, and did substitute in its place the revoked will of 1811; that the will of 1813 was never afterwards seen except by the said Relf and Chew, and their confederates.

It is further charged that the said Relf fraudulently set up the revoked will of 1811, and obtained probate of the same; that he, with the said Chew, being sworn as executors, fraudulently took possession of the real and personal estate of the deceased, and also his title-papers and books. That they appropriated to their own use large sums of money and a large amount of property of the estate, and in combination with the defendants named, who "had some knowledge, notice, information, belief, or suspicion, or reason for belief or suspicion, and did believe," that the said Relf and Chew had acted fraudulently in setting up and proving the will of 1811. And the complainants pray that effect may be given to the will of 1813, and that the will of 1811 may be revoked; and that the defendants may be decreed to deliver up possession of the lands purchased as aforesaid, and account for the rents, &c.; and that the executors may be decreed to account. The complainants also represent that the said Myra is the only heir at law of the said Clark; and that his property descended to her, &c. In addition to the special relief asked, the complainants pray for "such other and further relief in the premises, as the nature of the case may require."

To the bill, several of the defendants filed a special demurrer. On the argument of the demurrer, the opinions of the judges were opposed on the following points:—

1. Is the bill multifarious? and have the complainants a right to sue the defendants jointly in this case?

2. Can the court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?

3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law. The demurrer is not before the court, but the points certified. In considering these points, all the facts stated in the bill are admitted.

Whether the bill be multifarious or not is the first inquiry?

The complainants have made defendants, the executors named in the will of 1811, and all who have come to the possession of property *real and personal, by purchase or otherwise, [* 642] which belonged to Daniel Clark at the time of his death.

That a bill which is multifarious, may be demurred to for that cause is a general principle; but what shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms, a bill is said to be multifarious, which seeks to enforce against different individuals, demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. It has been decided that an author cannot file a joint bill against several booksellers for selling the same spurious edition of his work, as there is no privity between them. But it has been ruled that a bill may be sustained by the owner of a sole fishery against several persons who claimed under distinct rights. The only difference between these cases would seem to be, that the right of fishery was necessarily more limited than that of authorship. And how this should cause any difference of principle between the cases is not easily perceived.

It is well remarked by Lord Cottenham, in *Campbell v. Mackay*, 7 Simon, 564, and in *1 Mylne & Craig*, 603, "to lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible." Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience, in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

In a course of reasoning in the above-cited case, Lord Cottenham observes: "If, for instance, a father executed three deeds, all vesting

property in the same trustees, and upon similar trusts, for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments. That is a [* 643] proposition, * (he says,) to which I do not assent. It would, indeed, be extremely mischievous, if such a rule were established in point of law. No possible advantage could be gained by it; and it would lead to a multiplication of suits, in cases where it could answer no purpose to have the subject-matter of contest split up into a variety of separate bills." The same doctrine is found in Story's Equity Pleadings, § 534; Attorney-General v. Cradock, 3 Mylne & Craig, 85; 7 Sim. 241, 254.

In the above case against Cradock, the chancellor says: "The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule, if it were to impose upon the plaintiffs, and all the other defendants, two suits instead of one."

The bill prays that the defendants, Relf and Chew, may be decreed to account for moneys, &c., which came into their hands, as executors, under the will of 1811; and that the other defendants, who purchased from them real and personal property, may be compelled to surrender the same, and account, &c., on the ground that they had notice of the fraud of the executors.

The right of the complainant, Myra, must be sustained under the will of 1813, or as heir at law of Daniel Clark. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in their purchases. And the question arises on this state of facts, whether there is misjoinder or multifariousness in the bill, which makes the defendants parties.

On the part of the complainants there is no misjoinder, whether the claim be as devisee or heir at law. And the main ground of the defence, the validity of the will of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent, but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill.

The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to co-defendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike

interested. In its present form the bill avoids multiplicity of suits, * without subjecting the defendants to inconvenience or unreasonable expense. There are, however, two exceptions to this remark, one of which relates to Caroline Barnes and her husband. She is represented to be a devisee in the will of 1813, and, consequently, can have no common interest under the will of 1811. The other exception is, the prayer of the bill that the executors may account. In the rendition of this account, the other defendants have no interest, and such a matter, therefore, ought not to be connected with the general objects of the bill. The bill in these respects may be so amended, in the circuit court, as to avoid both the exceptions.

We come now to inquire "whether the court can entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed."

The bill charges that the will of 1813 was fraudulently suppressed or destroyed by Relf; and that he fraudulently procured the will of 1811, in which he and Chew were named as executors, to be proved.

It is contended that the court of probate in Louisiana has exclusive jurisdiction of the probate of wills, and that a court of chancery can exercise no jurisdiction in such a case.

In the Code of Practice, art. 924, it is declared, that "courts of probate have the exclusive power:—

1. "To open and receive the proof of last wills and testaments, and to order the execution and recording them." There are thirteen other specifications, which need not be named. By art. 925, it is declared that, "the court of probates shall have no jurisdiction except in the cases enumerated in the preceding article, or in those which shall be mentioned in the remaining part of this title."

In regard "to the opening and proving of wills," after providing where application for probate shall be made, and the mode, the following articles are adopted:—

Art. 934. "If the will be contained in a sealed packet, the judge shall order the opening of it at the time appointed by him, and shall then proceed to the proof of the will."

Art. 936. "If the petitioner alleges under oath in his petition, that he is informed that the will of the deceased, the opening of which and its proof and execution are prayed for, is deposited in the hands of a notary or any other person, the judge shall issue an order to such notary or other person, directing him to produce the will or the packet containing it, at a certain time to be mentioned, that it * may be opened and proved, or that the execution [* 645] of it may be ordered."

Art. 937. "If the notary, or other individual to whom the said order is directed, refuses to obey it, the judge shall issue an order to arrest him, and if he does not adduce good reasons for not producing the will, shall commit him to prison until he produces it; and he shall be answerable in damages to such persons as may suffer from his refusal."

From the above provisions, it is clear that, in Louisiana, the court of probates has exclusive jurisdiction in the proof of wills; and that its jurisdiction is not limited, like the ecclesiastical court in England, to wills which dispose of personal property. Has a court of equity power to set up a spoliated will, and carry it into effect?

Formerly, it was a point on which doubts were entertained, whether courts of equity could not relieve against a will fraudulently obtained. And there are cases where chancery has exercised such a jurisdiction. *Maundy v. Maundy*, 1 Chan. Rep. 66; *Welby v. Thornagh*, Prec. Chanc. 123; *Goss v. Tracy*, 1 P. Williams, 287; 2 Vernon, 700. In other cases, such a jurisdiction has been disclaimed, though the fraud was fully established, as in *Roberts v. Wynn*, 1 Chan. Rep. 125; *Archer v. Moss*, 2 Vernon, 8. In another class of cases, the fraudulent actor has been held a trustee for the party injured. *Herbert v. Lowns*, 1 Chan. Rep. 13; *Thynn v. Thynn*, 1 Vernon, 296; *Devenish v. Baines*, Prec. Chan. 3; *Barnesly v. Powel*, 1 Ves. 287. These cases present no very satisfactory result as to the question under consideration. But since the decision of *Kenrich v. Bransby*, 7 Brown's P. C. Tomb. Ed. 437, and *Webb v. Claverden*, 2 Atkyns, 424, it seems to be considered as settled, in England, that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and at law, on a devise of real property. *Bennett v. Vade*, 2 Atkyns, 324; 3 Atkyns, 17; *Gingell v. Horne*, 9 Sim. 539; *Jones v. Jones*, 3 Mer. 171.

In the last case, the master of the rolls says: "It is impossible that, at this time of day, it can be made a serious question, whether it be in this court that the validity of a will, either of real or personal estate, is to be determined."

In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign [* 646] any very *satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given.

By article 1637 of the Civil Code, it is declared that "no testament can have effect unless it has been presented to the judge," &c. And

in *Clappier et al. v. Banks*, 11 Louis. 593, it is held that a will, alleged to be lost or destroyed, and which has never been proved, cannot be set up as evidence of title in an action of revendication.

In *Armstrong v. Administrators of Kosciusko*, 12 Wheat. 169, this court held, that an action for a legacy could not be sustained under a will which had not been proved in this country before a court of probate, though it may have been effective, as a will, in the foreign country where it was made.

In *Tarver v. Tarver et al.* 9 Pet. 180, one of the objects of the bill being to set aside the probate of a will, the court said: "The bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal, from the court of probate, according to the provisions of the law of Alabama."

The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say, that both the general and local law require the will of 1813 to be proved, before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants, in regard to the above wills. These answers, being obtained, may be used as evidence before the court of probate, to establish the will of 1813, and revoke that of 1811.

In order that the complainants may have the means of making, if they shall see fit, a formal application to the probate court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And, indeed, circumstances may arise, on this part of the case, which shall require a more definite and efficient action by the circuit court. For, if the probate court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or on any other ground, and there shall be no remedy in the higher courts of the State, it may become the duty of the circuit court, having the parties before it, to require them to go before the court of probates, and consent to the proof of the will of 1813, and the revocation * of that of 1811. And should this [* 647] procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by establishing the will of 1813. In the case of *Barnesly v. Powel*, 1 Ves. Sen. 119, 284, 287, above cited, Lord Hardwicke decreed that the defendant should consent, in the ecclesiastical court, to the revocation of the will in controversy and the granting of ad-

ministration, &c. If the emergencies of the case shall require such a course as above indicated, it will not be without the sanction of Louisiana law. The twenty-first article of the civil court declares that, "in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."

This view seemed to be necessary to show on what ground and for what purpose jurisdiction may be exercised in reference to the will of 1813, though it has not been admitted to probate.

The third point is, "has the court jurisdiction in this case, or does it belong exclusively to a court of law?"

Much that has been said in relation to jurisdiction on the second point, equally applies to this one. Indeed, they might have been considered under the same general head.

The bill is inartificially drawn, and, to reach its main objects, may require amendment in the circuit court. It presents the right of the complainants in two aspects.

1. Under the will of 1813.
2. As heir at law of the deceased.

The first has been examined, and we will now consider the second.

In prosecuting their rights as heir at law by the complainants, no probate of the will of 1813 will be required. The complainants must rest upon the heirship of the said Myra, the fraud charged against the executors, in setting up and proving the will of 1811, and notice of such fraud by the purchasers. In this form of procedure, the will of 1811 is brought before the court collaterally. It is not an action of nullity, but a proceeding which may enable the court to give the proper relief without decreeing the revocation of the will. Such a proceeding at law, in regard to real estate, is one of ordinary occurrence in England. And it is upon the ground that such a remedy is plain and adequate, that equity will not give relief. There can be no

doubt, as between the heir at law and devisee, in ordinary [* 648] * cases, the proper remedy is to be found in a court of law.

Without enlarging on this point, at present, we will refer to the doctrine on this subject, as established by the Louisiana courts. The case of *O'Donagan v. Knox*, 11 Louis. 384, was "an heir at law claiming a share of the succession of her deceased sister, who was the wife of the defendant, who holds possession of it under a will, as instituted heir and universal legatee." The defendant pleaded to the jurisdiction of the district court, on the ground that the court of probates for the parish St. Landry had exclusive jurisdiction of the matters and things set up in the petition."

The district judge held, "that, as the will sought to be annulled had been admitted to probate, and ordered to be executed, the court had no jurisdiction, but that the probate court had exclusive jurisdiction of the case."

After stating the above decision of the district court, the supreme court say: "The plaintiff sets up a claim under the law of inheritance to lands, slaves, and a variety of movable property; that these are proper subjects for the exercise of the jurisdiction of district courts, cannot be doubted. But the petitioner proceeds further, and alleges the nullity of the will, which constitutes the very title under which the defendant holds the property in controversy. Before what court, then, must the validity of this will be tested?"

The court consider the jurisdiction of the court of probates, and then proceed to say: "It appears that the jurisdiction of the court of probates is limited to claims against successions for money, and that all claims for real property appertain to the ordinary tribunals, and are denied to courts of probate. The plaintiff in this case was therefore compelled, in suing for the property of the succession, to seek redress in the district court; and whether she attacked the will, or the defendant set it up as his title to the property, the court having cognizance of the subject must, of necessity, examine into its legal effect."

"When in an action of revendication a testament with probate becomes a subject of controversy, it will surely not be contended," say the court, "that a court of ordinary jurisdiction, having cognizance of the principal matter, shall suspend its proceedings until another court of limited powers shall pronounce upon the subject." "If the ordinary courts should examine into the validity of testaments, drawn in controversy before them, they will do no more than we have often said a court of limited jurisdiction may do, even in relation to a question it could not directly entertain." The court cite *Lewis's Heirs v. his Executors, 5 Louis. 387, [* 649] and say, there is no conflict, as, indeed, there is none, between that case and the one before them. They say that in the case before them, the functions of the executor had expired, the probate of the will had taken effect, and the devisee had entered into possession under it. The decision of the district court was reversed on the ground that it had jurisdiction of the case.

The above doctrine is fully affirmed in Robert v. Allier's Agent, 17 Louis. 15. "On the question of jurisdiction arising from the state of the case, we understand," say the court, "the distinction repeatedly made by this court to be that, whenever the validity or legality of a will is attacked and put at issue, (as in the present case,)

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at the time that an order for its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate under it, courts of probate alone have jurisdiction to declare it void." "But when an action of revendication is instituted by an heir at law, against the testamentary heir or universal legatee, who has been put in possession of the estate, and who sets up the will as his title to the property, district courts are the proper tribunals in which suits must be brought." 6 Martin's N. S. 263; 2 Louis. 23.

The functions of the executors under the will of 1811 have long since terminated, and the property of the deceased, both real and personal, has passed into the hands of purchasers. If the heir at law and the devisee were the only litigant parties, a suit at common law might afford an adequate remedy. But the controversy is rendered complicated by the numerous parties and the various circumstances under which their purchases were made. Besides, many facts, essential to the complainant's rights, are within the knowledge of the defendants, and may be proved only by their answers. Of this character is the fraud charged against the executors in proving the will and acting under it, and the notice of such fraud, before their purchase, alleged against the other defendants.

If the fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances, a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a court of [* 650] chancery, * in this view, are required to do complete justice between the parties.

This remedy under the Louisiana law, and before the Louisiana courts, of ordinary jurisdiction, would be undoubted. For, although those courts cannot annul the probate of a will, when presented collaterally, as a muniment of title, they inquire into its validity. Under the peculiar system of that State, the forms of procedure being conformable to the civil law, are the same in all cases. But the circuit court of the United States, exercising jurisdiction in Louisiana, as in every other State, preserves distinct the common law and chancery powers. In either the state or federal court, the relief is the same; the difference consists only in the mode of giving it.

It is insisted that trusts are abolished by the Louisiana code, and that, consequently, that great branch of equity jurisdiction cannot be exercised in that State.

Article 1507 of the civil code declares, "that substitutions and *fidei*

commissa are and remain prohibited." "Every disposition by which the donee, the heir or legatee, is charged to preserve for, or to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee," &c.

This abolishes express trusts, but it does not reach nor affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property. In such a case, the Louisiana law affords redress as speedily and amply as the law of any other State. There is, therefore, no foundation for the allegation that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name, it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust, for the rightful owner.

In answer to the objection that the validity of the will of 1811 collaterally can only be tested by an action at law and on an issue *devisavit vel non*, it may be said that such an issue may be directed by the circuit court.

Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint. The courts of the United States have involved no new or foreign principle in Louisiana. In deciding controversies in that State, the local law governs, the same as in every other State. Believing that "the mode of proceeding there in the state courts [* 651] was adequate to all the purposes of justice, and knowing with what pertinacity even forms are adhered to, I was averse to any change of the practice in the federal courts. But I was overruled; and I see in the change only a change of mode, which produces uniformity in the federal courts throughout the Union. No right is jeopardized by this, and, to say the least, wrongs are as well redressed, and rights as well protected, by the forms of chancery as by the forms of the civil law.

From the foregoing considerations, the court answer the first point certified in the affirmative, subject to the amendments of the bill, as suggested. And they answer the second and third points, with the qualifications stated, also in the affirmative.

CATRON, J. I agree the points certified must be answered favorably to the complainants; but I do not altogether agree with the reasoning that has led a majority of my brethren to this conclusion.

The answer to the second question, controls the answers to the others; it is: "Can the circuit court entertain jurisdiction of this

case, without probate of the will set up by the complainants, and which they charge to have been destroyed, or suppressed ? ”

The will of 1813 cannot be set up without a destruction of the will of 1811 ; this will has been duly proved, and stands as a title to the succession of the estate of Daniel Clark ; nor can the circuit court of the United States set the probate aside ; this can only be done by the probate court.

Nor can the will of 1813 be set up in chancery as an inconsistent and opposing succession to the estate, while the will of 1811 is standing in full force. Such is the doctrine in the English court of chancery, as will be seen by the cases of *Archer v. Mosse*, 2 Vern. 8 ; *Plume v. Beale*, 1 P. Wms. 388, and which are confirmed by the case of *Kenrich v. Barnsby* in the House of Lords, 7 Bro. P. Cases, 437. Nor do the doubtful suggestions of Lord Hardwicke in *Barnsby v. Powel*, 1 Ves. Sen. 119, 284, conflict with the previously settled doctrine, as I understand that case. The argument that a fraudulent probate is a fraud on the living, and therefore chancery can give relief by setting aside such probate, is a mistaken idea of the chancery powers. Surely, the probate of a fraudulent or forged paper is a fraud on the living, as much as the suppression of the last will, and

the causing to be proved, a revoked one ; still, chancery has [* 652] not assumed *jurisdiction to set aside the probate of a will alleged to have been forged or to be fraudulent, after the testator's death ; as will be seen by the cases cited ; although he who committed the fraud, or forgery, procured the probate to be had of the paper, in the probate court.

It by no means follows, however, that the court below has no jurisdiction of the case made by the bill in one of its aspects. Mrs. Gaines claims to be the only child and lawful heir of Daniel Clark. This we must take to be true. By the Civil Code of 1808, c. 3, § 1, art. 19, p. 212, it is declared : “ That donations either *inter vivos* or *mortis causâ*, cannot exceed the fifth part of the property of the disposer, if he leaves at his decease one or more legitimate children or descendants, born or to be born.”

By the case made in the bill, Mr. Clark could only dispose of one fifth part of his property at the time of his death ; provided he had no wife living ; and if she was living, then only of the one fifth part of one half. It follows, if the will of 1811 is permitted to stand as Daniel Clark's last and only will, that Mrs. Gaines can come in as heir for the four fifths. On this aspect of the bill she can proceed to establish and enforce her rights as heir, without making probate of the will of 1813, and the second question must be answered in the affirmative.

By the will of 1811, Mary Clark is the principal devisee. She made her will and died; by this will, Caroline Barnes is entitled to part of Daniel Clark's estate, and ought to be before the court to maintain her rights. I, therefore, do not concur that as to her the bill is multifarious. As to the purchasers from the executors, I have more difficulty. I agree, where there is one common title in the complainant; and this could only be the true source of all the titles in all the defendants, and they have not obtained the first link in the chain of title; that then the true owner may sue them together in chancery, although they claim by separate purchases from a spurious source. Such is the general rule; nor do I think the purchasers from Chew and Relf are exempt from its operation on the ground that they have no concern with the settlement of the accounts growing out of the administration. I therefore concur in answering the first question, that the bill is not multifarious.

The third question presents no difficulty as to the executors; they are properly sued in chancery for distribution beyond doubt; and so I imagine are the devisees of Mary Clark; they being by the will of * Mrs. Clark co-distributees with Mrs. Gaines [* 653] under the will of 1811, as to the one fifth part of Daniel Clark's estate.

The purchasers are charged with having purchased with knowledge of Mrs. Gaines's superior title; and with having fraudulently purchased from the executors with such knowledge; there being jurisdiction to grant relief against the executors, in chancery, the same court can grant relief against the purchasers, involved in the fraud of the executors. If they could be compelled to account in regard to the real estate when it remained in their hands; purchasers with notice of Mrs. Gaines's rights, and who purchased with the intention to defeat her rights and deprive her of them, can stand in no better situation than the executors, and must account likewise; both being held in a court of equity equally as trustees for the true owner. Therefore, on the face of the bill, a court of equity has jurisdiction; and a court of law has not exclusive jurisdiction, and thus the third point ought to be certified.

8 H. 838; 6 H. 550; 22 H. 478; 24 H. 558.

WILLIAM R. HANSON, JOSEPH L. MOSS, ISAAC PHILLIPS, JOSEPH M. MOSS, and DAVID SAMUEL, Plaintiffs in Error, v. LESSEE OF JOHN H. EUSTACE.

2 H. 653.

Though a refusal to produce books which are in a party's possession will warrant a jury in making all fair intendments in favor of the secondary evidence which is thus let in, yet

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this refusal is not an independent element, from which any thing can be inferred as to the point which was sought to be proved by the books, if produced.

ERROR to the circuit court of the United States for the eastern district of Pennsylvania. The facts upon which this court proceeded, and the instructions of the court below which were excepted to, are sufficiently stated in the opinion of the court.

Hubbell and Sergeant, for the plaintiffs.

Guillou and Fallon, contra.

[* 703] * WAYNE, J., delivered the opinion of the court.

The defendants in this case having failed to produce on the trial of it certain books of original entry, daybooks, &c., of the late firm of R. and L. Phillips, which had been called for by a regular notice, the court permitted the plaintiff to give secondary evidence of their contents. The object of the plaintiff in introducing the secondary evidence was to prove that the legal title to the Sixth street property was in R. and L. Phillips, the defendants having previously introduced a deed to that property from R. J. Herring and wife, dated the 9th June, 1832, to Robert Phillips.

The partners of the firm of R. and L. Phillips were Robert Phillips and Isaac Phillips. That firm, however, was dissolved by the death of Robert Phillips, in 1833. The survivor then took into partnership Joseph L. Moss, and the new firm traded under the style of the original firm of R. and L. Phillips.

The court, in reference to the refusal of the defendants to produce the books, and to the secondary evidence which had been given of their contents in respect to the Sixth street property, charged the jury, that, "in an ordinary case; the jury must decide, from the evidence before them, what facts have been proved; but in this case there is one feature which is rather unusual, and to which it is necessary to call your special attention, as a matter which has an important bearing on some of its prominent points. Timely notice was given by the plaintiff's counsel to the counsel of the assignors and assignees, to produce at the trial the books of R. and L. Phillips; no objection was made to the competency of the notice; they were called for, but were not produced till the day after the evidence was closed, and at the moment when the court had called on the plaintiff's counsel to address the jury. No reason was assigned for their non-

[* 704] production * save the reference to the illness of Mr. Moss; but Mr. Phillips was in court; notice was given to Mr. Hanson, though none was necessary, as the books could not be presumed to be in his possession. That they could have been produced before

the evidence on both sides was closed, can scarcely be doubted, when so many were produced afterwards. Their production, then, was no compliance with the notice; the plaintiff could not, without leave of the court, have referred to them; he was not bound to ask it, and had a right to proceed, as if they had not been produced.

“ Mr. Hanson had a right to call for the books; claiming by an adverse title, he might have moved the court for an order to produce them, but he made no effort to procure them; we say so, because there was no evidence that he did in any way endeavor to have them produced, although the court, in their opinion on the motion for a nonsuit, plainly intimated the effect of their non-production.

“ There has, therefore, been no satisfactory or reasonable ground assigned for their having been kept back, and the plaintiff has a fair case for calling on you to presume whatever the law will authorize you to presume as to the contents of the books. On this subject the 15th section of the Judiciary Act has made this provision: ‘ That all the said courts of the United States shall have power, in the trial of actions at law, and on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases, and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default.’ This enables courts of law to apply the same rules and principles, where papers or books are withheld, as have been adopted by courts of equity, which are these, in our opinion, as long since expressed in *Askew v. Odenheimer*, 1 Baldwin, 388, 389.”

“ It must not, then, be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them; a jury may presume as largely as a chancellor [* 705] may do, when he acts on his conscience, as a jury does, and ought to do, and on the same principles.

“ Mr. Bridges states that he believes there is an entry on the books, of the transfer from Herring to Robert and Isaac Phillips, but don't know how the transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books

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with the Sixth street lot; that the money of the firm was applied to the payment of the consideration money to Herring; one of the persons who erected the new building, says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of \$1,000, and the tax-collectors prove the payment of taxes by the firm. In opposition to this evidence, the defendants offer nothing; the books of the firm are suppressed, when they could and ought to have been produced; and the sole reliance in support of the title of Robert Phillips is the deed from Herring. If you believe the witnesses, Robert Phillips never was the sole and real owner of this property on the first purchase; and if you think the facts stated are true, you may and ought to presume, that if the books had been produced, they would have shown that the payment of the whole purchase-money, and the whole expense of the improvements made on the lot, were paid by the firm; that it formed an item of their joint estate, and was so considered by the partners. You may, also, and ought to presume, that the production of the books would have been favorable to the plaintiffs, and unfavorable to the defendants, in any other aspect as bearing on the ownership of this property. On such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips, or his heirs, were bound, on every principle of justice, conscience, and equity, to make a conveyance so as to make that title a legal one. And when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance, and sold the property under the assignment; that the purchaser from them had accepted a deed reciting theirs, and no other title; we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips, or his heirs, has been made, as they were bound in equity and good conscience to make.

“ Legal presumptions do not depend on any defined state [* 706] of things; * time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important, according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips, or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance; and we can perceive little, if any weight in the only circumstance set up to rebut it, which is the proceedings in the orphans' court. You will give them what consequence you may think they

may deserve, when you look to the time and the circumstances under which they were commenced, carried on, and completed by a sale for \$22,500, which counsel admit was not paid, and also admit that the sole object was to extinguish the mere spark of legal right remaining in Robert Phillips or his heirs, and not because he or they had any beneficial interest in the property. If there was lawful ground for presuming the existence of a conveyance from him, or them, before November, 1837, we should think that any thing accruing afterwards was entitled to no weight in rebutting such presumption; and were we in the jury-box, we would think it operated the other way. It was for the interest of the assignees and assenting creditors to consider the conveyance as not made; for if it had been made previously, a non-assenting creditor to the assignment might take it under a judgment, as was done by the plaintiff, and thereby hold it, if the assignment did not pass the title; whereas, by taking the deed as not made, the orphans' court sale would vest the title in the assignors, and leave no legal right on which a judgment against Joseph L. Moss and Isaac Phillips could attach. As, however, this is a matter entirely for your consideration, we leave it to your decision, with this principle of law for your guide; that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact, than to the reasons and policy of the law in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true, equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained uninterested and undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips * or his heirs, competent to vest the [* 707] title to the Sixth street lot in the firm of Robert and Isaac Phillips; that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

It appears, then, that the court made the refusal of the defendants to produce the books, the secondary evidence of their contents, and other evidence in the cause, the basis upon which it gave the foregoing instructions to the jury. The defendants excepted to them.

The inquiries, therefore, arising are; had a case been made, which authorized the court, as a matter of law, to give an opinion to the jury, that the facts proved would justify the presumption of a deed; and, if not, were the instructions given in terms which left the jury

to make the inference from the evidence alone, unaffected by considerations which it is not the province of a jury to indulge, that the legal title to the Sixth street property was in the late firm of R. and I. Phillips?

This property may be the partnership estate of the original firm of R. and I. Phillips, without the legal title being in the copartnership or in either of the partners. A deed was in evidence, that the legal title had been made to Robert Phillips. The plaintiff wished to show, that Robert Phillips had conveyed it, before he died, to the firm, or that there were circumstances in the case which raised the presumption that he had done so. No evidence was given to show that Robert Phillips had made such a conveyance. On the contrary, as the case stood, the proof was that R. J. Herring and wife had conveyed the Sixth street property to Robert Phillips, by deed dated the 9th June, 1832. The deed was in evidence. The plaintiff then proceeded to give secondary evidence of the contents of the books, which the defendants had refused to produce. That secondary evidence, as it is stated in the instruction, is, that "Mr. Bridges states that he believes there is an entry on the books of the transfer from Herring to Robert and Isaac Phillips, but don't know how that transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth street lot; that the money of the firm was applied to the payment of the consideration money to Herring. One of the persons who erected the new building, says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of \$1,000; and the tax-collectors prove the payment of the taxes by the [* 708] firm." Such is the proof, and * the only proof in the cause to show that the legal title to the Sixth street property was in the late firm of R. and I. Phillips. It may justify the inferences in the court's instructions, that Robert Phillips never was the sole and real owner of this property on the first purchase; that, if the books had been produced, it would have been shown that the consideration money for the lot was paid by the firm; that all the improvements were paid for by the money of the firm; that it formed a part of their joint estate; that they so considered it, and that Robert Phillips was bound in equity and good conscience to make a title to the firm; but the evidence is certainly deficient in those particulars which, according to the established law, will permit the presumption of a deed by a jury, as a matter of direction from the court. Before a court can instruct a jury to presume a grant or deed for land, time or length of possession must be shown, which, of itself, in certain

cases, and in other cases, in connection with circumstances, will induce the presumption of a grant as a matter of law, or as a legal effect from evidence, which the jury is instructed to make, if in its consideration of the evidence the jury believe it to be true. Or when the presumption in fact as to a legal title is founded upon the principle of *omnia rite esse acta*. Supposing, then, that the court did not intend to instruct the jury, that the legal effect of the evidence was to raise the presumption of a deed—we will now inquire what effect the refusal, to produce books and papers under a notice, has upon the point which a party supposes they would prove. The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence. It affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them. A party cannot infer from the refusal to produce books which have been called for, that, if produced, they would establish the fact which he alleges they would prove. The party in such a case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, &c., every intendment and presumption as to such particulars shall be against the party who might remove all doubt by producing the higher evidence. *Life and Fire Insurance Co. N. Y. v. Mech. Fire Insurance Co.* 7 Wend. 33, 34.

All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression. There, the *rule is, that *omnia præsumantur contra* [* 709] *spoliatorem*. In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element, from which any thing can be inferred as to the point which is sought to be proved by the books or papers. Nor can any views of policy, growing out of the refusal, be associated with the secondary evidence to enlarge the province of the jury, to infer or presume the existence of the fact to which that evidence relates. For considerations of policy, being the source, origin, and support of artificial presumptions, having no application to conclusions as to actual matter of fact, the finding of a jury in conformity with such considerations, and not according to their actual conviction of the truth, resolves itself into a rule or presumption of law.

Apply these principles to the instruction, and we find that the court, under a notice at common law to produce books and papers, and the refusal to produce them, without any other foundation having been laid to permit secondary evidence to be given of the exist-

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ence of a deed which had not been specifically called for, and the destruction or loss of which had not been alleged, permitted the plaintiff to give secondary evidence that a deed had been made, and upon his failure to do so, instructed the jury that it "must not be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them. A jury may presume, as largely as a chancellor may do, when he acts on his conscience, as a jury does and ought to do, and on the same principles." And further, after reciting the evidence which the court thought led to its conclusion, the court says: "Upon such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips or his heirs were bound on every principle of justice, conscience, and equity to make a conveyance, so as to make the title a legal one." To which the court adds: "When it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance and sold the property under the assignment, that the purchaser from them had accepted a deed reciting theirs and no other title, we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips or his heirs has been made, as they were bound in equity and good conscience to [* 710] make." "Legal.* presumptions do not depend on any defined state of things; time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and, in the total absence of all proof of any adverse claim by Robert Phillips or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance." And the instruction finally concludes with this direction: "As, however, this is a matter entirely for your consideration, we leave it to your decision with this principle of law for your guide, that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made, if the party who was in possession of the legal title, was bound in equity to convey to the real, true, and equitable owner. This legal presumption is not founded on the belief, alone, that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained undisturbed. Should

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your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips or his heirs, competent to vest the title to the Sixth street lot in the firm of Robert and Isaac Phillips, that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

Supposing, then, the term legal presumption to have been used in its known professional sense, it is obvious that the court did not mean it to be one that was absolute and conclusive, but one of law and fact. If the latter, we have already said such a presumption did not arise under the evidence, and the conclusion must be that the instruction did not leave the jury to presume, from the evidence alone, that a conveyance had been made of the Sixth street property by Robert Phillips, which vested the legal title to it in the late firm of R. and I. Phillips. We think the exception taken to these instructions must be sustained, and direct the judgment to be reversed.

In the consideration of this case, the court has not forgotten that there were many other points in the cause which were argued with great learning and ability. The court, however, abstains from *noticing them, and directs that its opinion should be [*711] exclusively confined to the instructions which have been considered.

18 H. 115.

THE BANK OF THE UNITED STATES, Plaintiff in Error, v. THE UNITED STATES.

2 H. 711.

Under the statute of Maryland, if a bill of exchange be paid, *supra protest*, for the honor of the payee, the first of three indorsers, who thereupon repays the amount of the bill, with interest and charges, to the person who took the bill for his honor, the payee thus becomes the holder of the bill, and may recover damages against the drawer.

Damages are allowed on bills as a compensation for not obtaining the money at the place stipulated, and not by way of a penalty.

The United States, being a drawer of a protested bill, is liable to pay damages.

ERROR to the circuit court of the United States for the eastern district of Pennsylvania. The case is stated in the opinion of the court.

Cadwallader and Sergeant, for the plaintiff.

Nelson, (attorney-general,) *contra*.

* **M'LEAN**, J., delivered the opinion of the court.

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A writ of error brings this case before the court, from the circuit court for the eastern district of Pennsylvania.

On the 7th of February, 1833, the secretary of the treasury of the United States drew the following bill on the minister and secretary of state for the department of finance of the French government:—

“Sir: I have the honor to request that at the sight of this my first bill of exchange, (the second and third of the same tenor and date unpaid,) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of 4,856,666 francs and 66 centimes; which includes the sum of \$3,916,666.66, being the amount of the first instalment to be paid to the United States, under the convention concluded between the United States and France, on the 4th of July, 1831,¹ (after deducting the amount of the first instalment to be reserved to France under the said convention,) and the additional sum of 940,000 francs, being one year's interest at four per cent. on all the instalments payable to the United States, from the day of the exchange of the ratification to the 2d of February, 1833.”

This bill was purchased by the bank, and indorsed by it to Messrs. Baring, Brothers, and Co., of London, and by them for value was indorsed, pay the order of N. M. Rothschild, Esq.; and by him it was directed to be paid to Messieurs De Rothschild, Brothers, or order, of Paris, for value in account.

[*734] * This bill on presentation not being paid, was protested, and was afterwards taken up on account of the first indorser by Hottinguer and Co., who also paid the costs, &c., and charged the whole sum to the Bank of the United States. Notice of the non-payment of this bill was given, in due time, to the drawer; and also that the bank claimed of the government interest, costs, and 15 per cent. damages on the bill. The government accounted to and paid the bank the principal of the bill and the costs, but refused to pay the damages.

Sometime after the protest, a dividend on the stock held by the United States having been declared by the bank, it retained a part of the dividend to cover the above damages. A suit being brought against the bank, by the government, to recover the dividend thus withheld, the bank set up as an offset the 15 per cent. damages claimed on the above bill.

On the trial, the court held, and so instructed the jury, that the

¹ 8 Stats. at Large, 480.

action was maintainable. That the set-off or credit claimed by the defendants was governed by the statute of Maryland. That if the bank had been the holder of the bill, at the time of the protest, it would, under the statute, be entitled to the damages claimed; but that it must be viewed as indorser, and consequently could not recover such damages, unless upon proof that they had been actually paid by the bank. To this charge the defendant's counsel excepted, and this brings before the court the questions for consideration.

Before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel; though not having been excepted to by the government, it is not a matter for decision.

It is supposed not to be a bill of exchange, as it was drawn payable out of a particular fund. This seems not to be the character of the bill. It was drawn for a certain sum, and the drawer then states on what account such sum was due from the French government. But there was no restriction as to what moneys or appropriation out of which the bill should be paid. This could in no sense restrain the negotiability of the instrument. It has the frame, character, and effect, of a bill of exchange. It was so called and treated by the secretary of the treasury, who drew it; by his successor, who had some correspondence in regard to it; by the attorney-general, to whom it was submitted for his opinion, by congress; and by the * eminent bankers in Europe, through whom it was [* 735] negotiated and paid.

That the United States can sustain an action against the bank, to recover a dividend declared in their favor, is undoubted. This seems to have been doubted by the counsel for the bank in the circuit court, but the objection has been abandoned in this court. Nor can there be any question of the right of the bank to set up, in this case, by way of offset, the damages in controversy, if the claim for damages be sustainable. This right is not contested by the attorney-general.

The main point in the case depends upon the construction of the Maryland statute, which applies to this district. It is singular that this statute, which was enacted in 1795, in regard to the question now before us, has never been construed by the local courts. And the same may be said of other and prior statutes of Maryland, containing similar provisions.

The 1st section of the act provides, "that upon all bills of exchange hereafter drawn in this State, on any person, corporation, company, or society, in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation, entitled to the same, shall have a right to

receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also 15 per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of protest, until the principal and damages are paid and satisfied; and if any indorser of such bill shall pay to the holder, or the person or persons, company, society, or corporation, entitled to the same, the value of the principal, and the damages and interest as aforesaid, such indorser shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer, or any other person or persons, company, society, or corporation, liable to such indorser upon such bill of exchange."

That the holder of a foreign bill, or other person entitled to it, may recover, under this statute, from the drawer, in case of protest, a sum that will purchase a similar bill of the same amount, together with 15 per cent. damages on the principal sum, is admitted. [* 736] * But it is insisted that the bank paid the bill as indorser; and that as there is no proof that it paid the 15 per cent. damages, they are not recoverable under the statute. The first part of the section gives to the holder of a protested bill its value at the place drawn, the 15 per cent. damages, and interest upon the value of the principal sum. The latter part of the section gives to the indorser, who has paid to the holder the value of the principal, the damages and interest on the entire sum paid, with legal interest. So that while the holder of the bill recovers only interest upon the principal sum, the indorser is entitled to interest on the whole sum paid by him. And to give interest on this sum, seems to have been the object of the latter clause of this section.

Had the bank retained the bill until its presentation and protest, there could be no question of its right, as holder, to the damages claimed. It indorsed the bill to Baring, Brothers, and Co., and they to Rothschild, who indorsed it to De Rothschild and Brothers. These last were the holders; and had not the bill been paid, *supra protest*, on account of the bank, as first indorser, they would have been entitled to the damages. Hottinguer and Co., having paid the bill for the honor of the bank, became the holders, and could recover the damages from it or the drawer. But they being the depositories of the bank, charged it with the amount they paid, by which the bank was remitted to its original character as payee and holder of the bill. In this light the bank was viewed and treated by the government, for it paid not only the principal sum and interest to the

bank, but also the costs of protest and other expenses chargeable under the laws of France. But the damages allowed by the statute were refused.

It has been intimated that these damages must be considered as a penalty, and not as a part of the bill. This is a mistaken view of the subject.

Had there been no statute, the bank, as the holder of the bill, would have been equally entitled to damages. They would have been claimed on a different principle, and might have been of a greater or less amount, according to circumstances. The origin and character of a bill of exchange are found in the law-merchant; that law which pervades the commercial world, and which, though founded on usage, has become as fixed and definite as any other branch of the law. Under this law, the drawer of a bill in this country payable in * a foreign country, is liable, should such bill [*737] be protested, not only for the costs of protest and other incidental charges, but also to re-exchange on the bill. The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the countries where the bill is drawn, and where it is made payable. Between this country and France, the exchange is often, if not generally, by the way of London.

The bill under consideration having been protested at Paris for non-payment, the holder under the general commercial law was entitled to a bill drawn at that place, payable in this city, for such sum as would pay the original bill at Paris, including costs of protest and other legal charges. This is re-exchange, and it varies, as must be seen, with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, re-exchange has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the State of Maryland, and almost all the other States of the Union, have fixed, by legislation, a certain amount of damages on protested foreign bills, in lieu of re-exchange. Experience has shown that this is a judicious regulation. It relieves the parties to the bill from great uncertainty, and promotes punctuality by showing the drawer what damages he must pay on the dishonor of his bill. Fifteen per cent. on the principal sum, which the statute adopts, may be greater than the actual re-exchange in the present case. But whether this be so or not, is not open for inquiry. It is believed that if this per cent. excluded the re-exchange, at the time this bill was protested, there are many other

cases in which it would fall short of that charge. The statute has, probably, fixed an amount which would be an average charge for re-exchange. This being the basis of the act, the damages cannot be considered as a penalty. The damages given by the statute are as much a part of the contract as the interest. On this point there is believed to be no difference of opinion among enlightened courts or commercial men.

The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, in France. The payee gives a premium for it, under the expectation of receiving the amount at the time and place where the bill is made payable. [* 738] It is protested for non-payment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris, and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which should sell at Paris for the sum claimed. The statute of Maryland, then, is founded on equitable considerations, although the rule of damages may be considered arbitrary, as it does not yield to circumstances.

In this case the bank purchased the bill from the government, and paid for it. It was sold and transferred by the bank. But the bill not being paid to the holder, the bank paid the amount of it, including the costs of protest and other charges, to Hottinguer and Co., at Paris, who had taken it up *supra protest*, for the honor of the first indorser. The bank, in this manner, came again into possession of the bill, the indorsements, in effect, being stricken out. In a commercial and legal sense, then, the bank is the holder of the bill, and has the same claim for damages as if it had never been indorsed. Had the government been suable by the bank, it must have declared and recovered as payee and holder, and not as indorser of the bill.

No objection is taken, in the bill of exceptions, as to the liability of the government to damages, on a protested bill of exchange drawn by it, the same as an individual. No such question, therefore, arises in this case. As the holder of a protested bill, the government exacts damages; it would seem to be equitable, therefore, that, as drawer under like circumstances, it should pay them.

Upon the whole, we think, that in view of the circumstances of this case, the bank is entitled to the 15 per cent. damages, under the

Maryland statute, and that, consequently, the instructions of the circuit court were erroneous. The judgment of that court is, therefore, reversed, and the cause is remanded to that court, and a *venire de novo* is awarded, &c.

CATRON, J. By the instructions given by the circuit court, the controversy is made to turn on the construction of the statute of Maryland; nor does *the record raise any question [*739] on the transaction growing out of the fact, that it was one between governments, to obtain a sum of money due from the one to the other; in which the corporation acted as an instrument and agent, in a form suggested by itself, to obtain the money. For instance: if it be true that the United States, in fact, received no money from the bank for the bill, it not having been charged to the bank; this being found, with the additional fact, that the parties intended to await the event of payment, or refusal, on the part of France, and let the bank hold and use the money awaiting the event; then the question on the equity of the case may arise. But the jury did not pass on any such facts, the instruction given rendering the inquiry unnecessary; and so it cut off every other question the plaintiff might have raised in opposition to the offset claimed.

The foregoing is given merely as an instance to show that no question arises on the record, but that involving the construction of the act of 1785.

The statute provides for two classes of cases: 1st, "the owner or holder of the protested bill, or the person or persons, company, society, or corporation entitled to the same;" and, 2dly, "any indorser of the bill who should pay to the holder, or the person or persons, company, society, or corporation entitled to the same, the value of the principal and the damages and interest."

In the first class, the "owner or holder," &c., shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill, from the time of protest, until the principal and damages are paid and satisfied.

In the second class, the indorser who has paid the principal, damages, and interest, shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer or any other person or persons, company, society, or corporation, liable to such indorser upon such bill of exchange.

It is not necessary to inquire whether this statute includes all possible cases, and if it does not, by what law the cases so unprovided for would be governed, because the bank is seeking, in this [*740] instance, *to bring itself within the statute, unless it does so, the precise claim of fifteen per cent. cannot be sustained. The charge of the court below was twofold.

1. That the case was governed by the law of Maryland, and
2. Construing that law.

The bill of exceptions includes both points; but this court has proceeded to examine and decide the cause on the second only, passing over the first.

The bank must then bring itself within one of the two classes above described; but let us examine them in order.

Was the bank at the time when its present rights accrued, the "owner or holder of the bill?" I say at the time its present rights accrued, because this general proposition includes the rights acquired at the time of protest, or acquired subsequently, each of which branches must be separately examined.

The bill was indorsed to Messrs. Baring, Brothers, and Co., of London, on some day which the record does not state; that it was sold to the Barings, and not sent over for collection, is not controverted, nor open to question.

It was then passed by indorsement to N. M. Rothschild, and from him to the Messrs. Rothschild, in Paris, in whose possession it is found on the day that it became due. It was at their request that a demand was made, by the notary, for payment, and upon refusal, that the bill was protested. So far, they appear to have been, and no doubt were, both the "owners and holders of the bill," and the only "persons entitled to the same at the time of the protest."

Hottinguer and Co., intervened immediately after protest, and paid the bill for the honor of the bank. What rights were then acquired?

It will not be necessary to examine and decide whether they acquired a right to fifteen per cent. damages or not, or to comment upon the want of harmony in the law, if it were to allow to a volunteer, who had no right to complain of anybody, the same damages which it gives to a disappointed and suffering party expressly because he has been put to great inconvenience and to hazard of discredit, by the omission of the drawer to provide the necessary funds to meet the bill. The books and cases all recognize the right of such a volunteer to principal, interest, and costs. If Hottinguer and

Co. were the parties to this suit, it would become necessary [*741] to *examine the question of their claim to damages; but we are now investigating the rights of the bank.

Granting that the Messrs. Rothschild, immediately upon protest, became vested with the right under the statute, to "receive and recover" from the drawer fifteen per cent. damages in addition to the other sum pointed out in the law; and granting also, for the sake of the argument, that all these rights passed to M. Hottinguer, with the delivery of the bill, it is clear that he was vested with a right that he could exercise or not at his pleasure. If he forbore to claim the damages, he mutilated the rights attached to the bill, supposing all the rights of the parties to be transferred with the bill from one to another. His right to relinquish the damages cannot well be disputed. It was property, and could be given away. It is not our province to inquire into his reasons, we can deal only with facts. It appears from the record, that instead of charging fifteen per cent. damages, he contented himself with charging a commission of one half per cent., amounting to 24,283 francs and 33 centimes; less than \$5,000. This commission may have been paid to him by the bank, and it appears from a report from the first auditor's office, dated July 29, 1837, that this commission would be paid by the United States to the bank upon presentation of a proper voucher.

There is nothing in the record to show that Hottinguer and Co., even up to this time, sanction this claim of fifteen per cent., or that the bank intends to pay it over to Hottinguer and Co., if it shall succeed in compelling the United States to pay it. On the contrary, the claim of the bank appears to be prosecuted for its own benefit, and the result will be that the bank, if it succeeds in this suit, will pay to Hottinguer and Co. less than \$5,000, and keep \$165,000 for itself.

At the time of the protest, and immediately afterwards, comprehending the payment *supra protest*, and protest itself, either Rothschild or Hottinguer and Co. were the "owners or holders" of the bill, as described in the first class of the statute, and of course no rights whatever accrued to the bank. Did it subsequently acquire any?

In what particular manner the bill was transferred by Hottinguer and Co. to the bank after protest and payment; whether by general or special indorsement, or by a receipt upon the bill, the record does not show. It only says that "the bill of exchange and protest" were transmitted to the bank, which thereby, and by [*742] reason of the premises, became and were again holders and owners of the same." But the claim for fifteen per cent. damages had been voluntarily waived, as we have seen, by Hottinguer and Co., and it is not easy to see how any person claiming under them could have any more rights than those which the assignors chose to

insist upon. The mere possession of the bill is not sufficient, because that possession was accompanied by a contemporaneous declaration that Hottinguer and Co. intended to claim nothing more than one half per cent. commission.

It is not perceived, then, how the bank can bring itself within the class of cases provided for in the first branch of the statute. Is it within the second?

This depends entirely upon the answer to the question, has it, as indorser, paid the damages to the owner or holder of the bill, or to any one? If it has, the record does not show it. On the contrary, all that it has paid was the commission of a half per cent. to Hottinguer and Co., if indeed it has paid that, for there is no evidence of it. The propriety of the statute is not the subject of examination, but it may be remarked that it appears to be founded on reason and justice. Every successive indorser, as he transfers a bill of exchange, receives from the indorsee its full value; and being thus reimbursed for his outlay in the purchase of the bill, the inconvenience which falls upon somebody when the bill is protested does not touch him. His account is already balanced. The reason therefore for allowing damages utterly ceases as to him. He has no fresh bill to purchase, either by re-exchange or in any other manner. But when he is made responsible, as he may be, to the holder, for the amount of the bill and damages, it is fair and reasonable that the same liability should travel upward until it is ultimately fastened upon the drawer; each indorser being obliged to refund to the one below him exactly what that one has been compelled to pay. But the bank has not paid these damages, and consequently is not within the second class of cases.

Being not within the statute at all, the claim for damages cannot be sustained.

The argument that the fifteen per cent. is not damages, but exchange, is entirely unsound, as I conceive, in this case. The statute gives exchange from the place of drawing interest, costs of [*743] protest, *and fifteen per cent. damages, in addition. The first is indemnity; the second a penalty. By commercial men, the first is construed liberally, as within the general rule governing bills of exchange, with the difference of estimating the exchange from the place of drawing, instead of re-exchange; the right to the penalty is strictly construed, according to the words of the statute. Its plain meaning must govern the merchant and business man; for him it was made. He is told that the owner of a bill, at the time of its protest, shall be entitled to fifteen per cent. damages from the drawer, or indorser, in every case; and that the indorser

shall be entitled to the same, (from the drawer, or a prior indorser,) provided the owner makes him pay the fifteen per cent.; not otherwise. And this I understand to have been the uniform mode of proceeding under the statute by the merchants of Maryland, under the 1st and 3d sections of the act; nor does it appear by the books of reports of that State, that this interpretation by business men has ever been questioned in the courts of justice there. For the reasons stated, I think the instruction given to the jury in the circuit court was proper, and that the judgment ought to be affirmed.

WAYNE, J. I concur in the opinion that the judgment of the court below ought to be reversed, but not for the reasons given in the opinion of the court.

DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES.
DECEMBER TERM, 1844.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. ROGER B. TANEY, CHIEF JUSTICE.	
HON. JOSEPH STORY,	}
HON. JOHN M'LEAN,	
HON. JAMES M. WAYNE,	
HON. JOHN CATRON,	
HON. JOHN M'KINLEY,	
HON. PETER V. DANIEL, AND	
HON. SAMUEL NELSON,	
JOHN Y. MASON, Esq., ATTORNEY-GENERAL.	
WILLIAM THOMAS CARROLL, Esq., CLERK.	
BENJAMIN C. HOWARD, Esq., REPORTER.	
ALEXANDER HUNTER, Esq., MARSHAL.	

ANDREW ALDRIDGE and others, Plaintiffs in Error, v. NATHANIEL F. WILLIAMS.

3 H. 1.

Under the Tariff Act of March 2, 1833, (4 Stats. at Large, 629,) the government was authorized to collect duties upon goods imported after June 30, 1842, and the regulations for ascertaining the amount of duties provided by existing laws, are to be applied, so far as they are applicable, to the collection of duties under this act, though the place in reference to which the value of goods was to be appraised, is changed from the foreign country to the port of importation, and no corresponding change is made in the instrumentalities for ascertaining the home value.

THE case is stated in the opinion of the court.

***R. Johnson,* for the plaintiffs.**

***Nelson,* (attorney-general,) *contra*.**

•TANEY, C. J., delivered the opinion of the court. [* 23]

This suit comes before the court upon a case stated, and is brought here by writ of error from the circuit court for the district of Maryland.

The case, in its material circumstances, is this : —

On the 20th of August, 1842, the plaintiffs in error imported into the port of Baltimore, from Liverpool, certain merchandise particularly set forth in the record, which, at the port of Baltimore, was of the value of \$44,346, as ascertained by appraisement at the custom-house. Upon these goods the defendant in error, who was at that time the collector, acting in pursuance of orders and regulations made by the treasury department under the direction of the President, demanded for duties twenty per cent. upon the value so ascertained, which amount was paid by the plaintiffs in error under protest; and this action instituted against the collector for the purpose of recovering back the money. There are some other circumstances mentioned in the case stated, but in the view which the court takes of the subject, it is unnecessary to recapitulate them. The judgment of the circuit court was in favor of the defendant.

The great question intended to be tried is, whether, under the act of congress of March 2, 1833, the government was authorized to *collect any duties upon goods imported after the [* 24] 30th of June, 1842, without the aid of further legislation by congress?

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law, as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

The act in question is certainly not free from difficulty; and this difficulty arises from its peculiar character. It is commonly called the Compromise Act, and upon the face of it, it is evident that something was intended beyond the ordinary scope of legislation. Provisions are introduced in relation to the future action of congress upon the tariff, which can only be accounted for by regarding the act as a compromise of conflicting opinions on that subject, whereby a certain scale of duties was fixed upon and established until June

30, 1842, and certain leading principles agreed upon, by which, after that time, it was proposed to regulate the action of congress, and the latter, as well as the former, inserted in the law in the forms of legislation. That this was the case is abundantly manifested by several clauses in the act, and particularly in the 6th and last section, which provides that nothing contained in the act shall be construed to prevent the passage, prior or subsequent to the 30th of June, 1842, of laws to prevent and punish evasions of the duties imposed by law, nor to prevent the passage of any act prior to the day last mentioned, in the contingency of either excess or deficiency of the revenue, altering the rates of duties on articles which, under the act of July 14, 1832,¹ were subject to a less rate of duty than twenty per cent., in such manner as not to exceed that rate, and so as to adjust the revenue to either of the aforesaid contingencies. Now it is impossible to suppose that congress could have doubted its power to repeal, or modify afterwards, the duties imposed by this act, in such manner as the public exigencies might require, or its power to pass laws to secure the collection of the revenue, and to punish any one who might attempt to evade the duties imposed by an act of congress. If there had been nothing in this law out of the ordinary course of legislative action, it would hardly have been deemed necessary to incumber it with these reservations of power, which nobody doubted, and which congress was continually exercising upon every other subject. These provisions strongly mark its peculiar character. And this association of positive and imperative enactments, with agreements for future action, has perhaps unavoidably occasioned some obscurity, [* 25] and, as to some of the clauses, made it difficult at * first sight to say whether the language was mandatory, or merely declared the principles by which it was proposed that the legislation of congress should afterwards be governed.

Taking this view of its general character and objects, the very large sum ultimately involved in the controversy makes it the duty of the court to proceed to a closer and more careful examination of its different provisions. It is evidently supplementary to the act of July 14, 1832, and repeals only so much of that act, and of other previous acts, as are inconsistent with it. All of the duties, therefore, imposed by the act of 1832, or any other law, and all the rules and regulations provided for their collection, remain in full force, unless they are inconsistent with the act in question.

The point to be determined then is, whether, after the 30th of June, 1842, the collection of duties imposed by the act of 1832, or by any

¹ 4 Stats. at Large, 588.

other law as modified by the act of 1833, is inconsistent with the last-mentioned act. In other words, whether it repeals all previous laws imposing duties after the time above mentioned; and if it does not, whether it has failed to provide the necessary rules and regulations to enable the proper officers to collect them.

The 1st section declares, that all duties above twenty per cent. *ad valorem*, imposed by the act of 1832, or any previous laws, shall be reduced annually at the rate therein mentioned, until the 31st of December, 1841; and that, after that time, the one half of the excess above twenty per cent. shall be deducted; and from and after the 30th of June, 1842, the other half shall be deducted. Here the section stops; and so far, therefore, from repealing the whole duties, it, by necessary implication continues a duty of twenty per cent. after the 30th of June, 1842; for the direction to deduct the excess above that sum presupposes that a duty to that amount is imposed and to be collected. The language used is equivalent to a positive enactment, that from and after the 30th of June, 1842, the goods therein mentioned shall be charged with that duty.

The 2d section is to the same effect. For after modifying the duties imposed by the act of 1832, in regard to the articles mentioned in that section, it declares that these duties shall be liable to the same deductions as are prescribed in the 1st section—that is to say, the excess over twenty per cent. remaining on the 30th of June, 1842, is to be deducted, and consequently very clearly implying that twenty per cent. is to be charged and collected after that period.

The 3d section provides, that the duties imposed by existing laws as modified by that act, shall remain and continue to be collected until the 30th of June, 1842; that after that time all duties shall be collected in ready money; and that such duties shall be laid as are necessary to an economical administration of the government, and shall be assessed upon the value of the goods at the port where they are entered, “under such regulations as may be prescribed by law.”

The latter words of this section relate merely to the regulations * by which the duties were to be collected after the [* 26] time specified, and that part of the controversy will be hereafter considered. The points to which our attention is now directed is, whether under this and the preceding acts of congress, any duties continue to be imposed; in other words, whether they were not all repealed by this act after the 30th of June, 1842. Certainly, the provision that they shall be paid in cash, and assessed upon the home valuation is no repeal. Can the provision, that such duties should

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be laid, after the time above mentioned, as were necessary to an economical administration of the government, be construed to repeal all the duties existing at that time? We think not. The court are not authorized to decide upon the amount of revenue necessary to an economical administration of the government. It is a question for the legislature. And the provision in this clause of the section addresses itself to future legislative bodies, and not to the tribunals and officers whose duty it is to carry into execution the laws of congress. And we should hardly be justified, by any rule for the judicial interpretation of statutes, in pronouncing terms like these to be an implied repeal of all duties after the time specified, when that construction would make the law inconsistent with itself, by repealing, in the 3d section, the duties it had continued in force in the 1st and 2d. On the contrary, the true judicial inference would rather seem to be, that it was supposed, at the time of the passage of the act, that the modified duties remaining imposed on the 30th of June, 1842, might produce the proper amount of revenue to be levied with a view to the economical administration of the government, but leaving it to congress, when the time arrived, to alter and modify them in the manner and for the purposes specified in this act.

The 4th section merely provides that certain enumerated articles shall be admitted to entry free from duty, from December 31, 1833, until the 30th of June, 1842, and therefore contains nothing that can influence the decision of the court.

The 5th section declares certain articles free after the 30th of June, 1842, and then provides, that all imports on which the 1st section operates, and all articles which were at the time of the passage of the law, admitted to entry free from duty, or paying a less rate of duty than twenty per cent. *ad valorem*, before the 30th day of June, 1842, may be admitted to entry subject to such duty, not exceeding twenty per cent. as shall be provided for by law; and this section, as well as the 3d, has been much relied on in opposition to the duty claimed by the government. But is it not like the clause in the 3d, of which we have already spoken, the language of compromise and agreement, and addressed to those who should be afterwards called upon to legislate on the subject, rather than to the administrative tribunals and officers of the country? It reserves to congress the right to reduce the duties continued by the 1st section

below twenty per cent.; to impose duties on free articles,
[*27] and to *raise duties which were below twenty per cent. up to that amount. Yet nobody could have supposed that congress would not have the power to do all this, if it thought proper to exercise it, without any reservation of this description. The clause

obviously was not introduced to reserve power, but with a view to the manner in which it should afterwards be exercised. As a mere question of power, congress undoubtedly had authority, after the 30th June, 1842, as well as before, to impose any duties it saw fit upon the articles referred to, or upon any other imports. And it cannot be supposed that the congress of 1833 intended to restrict, by force of law, the rights of a future congress. Yet if we lose sight of the compromise character of the act, and treat it as an ordinary act of legislation, we should be bound to say, from the language used, that the congress of 1833 supposed that the modifications of the revenue made by them could not be altered by a subsequent legislature, unless the right to do so was expressly reserved. No one would think of placing such a construction upon the section in question; and the difficulty is removed when we look at it in what we doubt not is its true light, and regard it as a compromise of conflicting opinions, which it was believed would be afterwards respected, when it had thus been solemnly set forth in a law. In this view of the subject, it is not repugnant to the 1st and 2d sections, and leaves the duties retained by them in full force after the 30th of June, 1842, until they should be altered by subsequent legislation.

The 6th and last section, the contents of which have been already stated, still more clearly marks the character of the act; and upon a view of the whole law, the court are of opinion that the duties which were in force on the 1st of July, 1842, continued in force, until they were afterwards changed by act of congress.

This brings us to the remaining inquiry, whether, after the 30th of June, 1842, there were any regulations in force, by which the officers of the revenue were authorized to collect the duties which had not been repealed by the act of 1833; and this question may be disposed of in a few words, as it rests altogether upon the 3d section, the material parts of which have been already stated.

Before the passage of the act of 1833, there were certainly regulations prescribed by law, abundantly sufficient for the collection of the revenue. The clause at the close of the 3d section, which directs that after the time so often referred to, the duties shall be assessed upon the value at the port where the goods are entered, "under such regulations as may be prescribed by law," can scarcely be considered as an implied repeal of all previous regulations; for it does not confine the regulations spoken of to such as might afterwards be enacted, but uses the ordinary legislative language appropriate to the subject, which naturally and evidently embraces all regulations lawfully existing at the time the home duties went into operation, whether

[* 28] made before or afterwards. They can, by * no just rule of construction, be held to repeal preëxisting ones, nor to require any new legislation upon the subject, unless it should turn out that those already in force were insufficient for the purpose.

But it has been urged that this clause, taken in connection with the new rule of home valuation, then for the first time established, and to which they refer, shows that new regulations were contemplated, inasmuch as the existing legislation upon that subject had been directed altogether to the value at the place of export. This argument would undoubtedly be entitled to great weight, if the subsisting rules and regulations could not be applied to this new mode of assessing the duties. But if the regulations already in force were applicable to this new state of things, there is no reason for concluding that there was any intention to repeal them, even although it should appear that they had been framed with a view to the foreign value, and should be found more difficult of execution, and less satisfactory in the result, when applied to the value at the port of entry.

The most important regulations in relation to this part of the case are contained in the 7th, 8th, and 9th sections of the act of July 14, 1832. It is true, that these regulations point to the value of the goods at the place of export; and many of the powers particularly conferred on the appraisers would not assist them in ascertaining the value at the place of import, and could not be used for that purpose. But the substantial and manifest object of these regulations is to enable the proper officers to determine the amount, upon which the rate of impost fixed by law is chargeable; and if the place, with reference to which the valuation is to be made, is changed, it does not by any means follow that the powers before given to the officers, and the duties imposed upon them, are not still to be exercised and performed so far as they are applicable to the new state of things. The object and intention of the valuation is still the same. It is to execute the law, and to assess and collect the duty prescribed. Thus, for example, the 7th section of the act of 1832 declares, among other things, that it shall be the duty of the appraisers, and of every person acting as such, by all reasonable ways or means in his power, to ascertain, estimate, and appraise the true and actual value of the goods, at the time purchased and the place from which they were imported. The place of valuation is afterwards changed by the act of 1833, and the duty imposed according to the value at the home port. It would be a most unreasonable interpretation of the law, to say, that the appraisers must still go through the ceremony of estimating the value at the foreign port; or, that the mere change of place repealed the authority to value at all. In both cases the only object of the ap-

praisement is to ascertain the sum upon which the duty is to be calculated; and the value of the goods at the foreign port, or at the home port, is of no importance to the public except in so far as it fixes the sum upon which the collector is to levy [* 29] the rate of duty directed by law.

The 9th section makes it the duty of the secretary of the treasury, under the direction of the President, from time to time, to establish such rules and regulations, not inconsistent with the laws of the United States, as the President shall think proper, to secure a just, faithful, and impartial appraisal of all goods, wares, and merchandises, as aforesaid imported into the United States, and just and proper entries of such actual value thereof, and of the square yards, parcels, or other quantities, as the case may require, and of such actual value of every of them; and it is made the duty of the secretary of the treasury to report all such rules and regulations, with the reasons therefor, to the next session of congress. It is very clear that any regulations within the authority thus given, are regulations prescribed by law. And although this section, as well as the others before mentioned, undoubtedly contemplated the value at the foreign port, yet when the valuation is transferred to a home port, it was still the duty of the secretary of the treasury to frame rules and regulations to ascertain the value upon which the law directed that the duty should be assessed. For this is the only object of the appraisement, and the only purpose for which rules and regulations are to be framed.

Indeed, when it is evident that under the act of 1833 certain duties, as therein modified, were continued after the 30th of June, 1842, it would scarcely consist with judicial duty, to give an over-technical construction to doubtful words, which would make the legislature inconsistent with itself, by imposing a duty on goods imported, and at the same time repealing all laws by which that duty could be collected. For it cannot be supposed that congress in one and the same law, could so have intended; and such an intention ought not to be implied, unless it was apparent from unequivocal language. We think that there are no words in the act of 1833, from which such a design can fairly be inferred.

It appears from the case stated, that the goods in question were subject to a duty of twenty per cent. under the 1st section of the last-mentioned act; and that the duties in this case were assessed accordingly upon the value of the goods at the port at which they entered, as ascertained and appraised under the rules and regulations established by the secretary of the treasury under the direction of the President. In the opinion of the court, they were lawfully assessed

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and collected, and the judgment of the circuit court is therefore affirmed.

We forbear to express an opinion upon the construction of the act of 1839,¹ which was argued in this case, because it is understood that other cases are standing for argument, in which that question alone is involved; and it is proper to give the parties an opportunity of being heard before the point is decided.

[* 30] * M'LEAN, J. The decision of this case turns upon the construction of the act of 1833, and as I differ from the opinion of a majority of the judges, I will state, in a few words, my views upon the subject.

The 1st section of the act provides, that ten per cent. on the existing duties shall be deducted annually, until the duties shall be reduced to twenty per cent.

The 3d section declares: "That until the 30th day of June, 1842, the duties imposed by existing laws, as modified by this act, shall remain and continue to be collected. And from and after the day last aforesaid, all duties upon imports shall be collected in ready money; and all credits now allowed by law, in the payment of duties, shall be, and are hereby abolished; and such duties shall be laid, for the purpose of raising such revenue as may be necessary to an economical administration of the government; and from and after the day last aforesaid, the duties required to be paid by law on goods, wares, and merchandise, shall be assessed upon the value thereof, at the port where the same shall be entered, under such regulations as may be provided by law."

The above sections can scarcely be misapprehended by any one. The 1st section reduces existing duties, in a time and manner stated, to twenty per cent. And the 3d section provides: "That until the 30th of June, 1842, the duties imposed by existing laws as modified by that act, shall remain and continue to be collected. Now the inference is irresistible, that after the above date, the duties shall not be collected under those laws. And this is shown conclusively by the 5th section, which provides, that all imports on which the 1st section of the act may operate, and all articles then admitted to entry free from duty, or paying a less rate of duty than twenty per centum, *ad valorem*, before the said 30th day of June, 1842, from and after that day, may be admitted to entry subject to such duty, not exceeding twenty per centum, *ad valorem*, as shall be provided by law."

Now, these are not terms of compromise, but of enactment. After

¹ 5 Stats. at Large, 348.

the day specified, the law declares that the duties shall not exceed twenty per cent. This, like all other laws, was liable to be repealed, expressly or by implication. But it is law, until so repealed. The duties are not to exceed twenty per cent., but that does not establish them at twenty per cent.

The 6th section of the act repeals all laws inconsistent with it. The twenty per cent. duties, by this act, were to be continued only to the 30th of July, 1842. After that, by the same act, the duties were not to exceed twenty per cent. Here is no repugnancy in the law, because the one provision is to cease at the same time that the other begins to operate. It is impossible that both enactments can be in force at the same time. They are inconsistent with each other. The one provision fixes a definite amount of duties, the other an indefinite amount. Not to exceed twenty per cent., is not twenty per cent. To give effect to this provision, future legislation [* 31] was necessary. But, is it the less binding on that account?

Can it be disregarded on the ground that it was a mere matter of compromise? It has the form and solemnity of law, and it shows that the act imposing duties expired on the 30th of July, 1842.

That this was the view of congress, is manifest from the fact that in due time they passed an act regulating the duties, to take effect from the above date, which did not receive the signature of the executive. But this is no reason why we, by construction, should continue in force a law which congress had repealed. After the above date, such duties were to be imposed "as shall be provided by law." Now, this language cannot be mistaken; and it is inconsistent with the idea that the law imposing duties prior to that date, should, after it, continue in force. Such a construction is unwarranted by the 3d section and the whole tenor of the act.

It is not for this court to determine, whether congress, in this respect, acted wisely or unwisely; whether their motive was to compromise great and conflicting interests or not; but what have they declared to be law? It would be a restriction on the legislative power, hitherto unknown, to say, that congress cannot repeal a law, unless they substitute another law in its place.

If the duty law in force prior to the 30th of July, 1842, be inconsistent with the provisions of the act under consideration, then the prior law is repealed. And it is no answer to this to say, that the prior law, in its modified form, is in force by virtue of the act of 1833. The plain and unequivocal enactments of that act repudiate such an inference. In its modified form, the prior law, by that act, expired in 1842. And after that, a new enactment, in my judgment, was essential, not only to continue duties upon foreign merchandise,

but also to give effect to all the important provisions of the act of 1833.

The 3d section, after July, 1842, abolishes all credits for duties, and requires them "to be paid in ready money;" and it further provides, "that duties shall be laid for the raising of such revenue as may be necessary to an economical administration of the government;" and that the duties "required to be paid by law," "shall be assessed upon the value of the goods at the port where the same shall be entered, under such regulations as may be prescribed by law."

Now, every one of these provisions was adopted with reference to its taking effect from, and after the 30th of July, 1842. They all belong to the same class. The credit for duties was to be then abolished, and prompt payment required. From and after that day, duties were to be laid to meet the expenditure of an economical administration of the government. And after that day, "the duties required to be paid by law," were to be assessed on the value of the goods at the port of entry; and this assessment is required to be

made "under such regulations as may be prescribed by [* 32] law." * These provisions cannot, by any known rule of construction, be made to refer to laws or regulations existing at the time of their enactment. They all refer to the future; to future laws, and regulations prescribed by those laws.

The existing laws made no provision to carry into effect the changes in the system, introduced by the act of 1833. Appraisers were appointed under former acts, but there was no law or regulation as to the home valuation. This was a most important matter, under the new system. And it is perceived, from the explicit provision of the act of 1833, that congress did not intend to leave an arrangement of so much importance to the discretion of the secretary of the treasury or of the President. They declare, that the duties shall be assessed, "under such regulations as may be prescribed by law." This is not to be met by argument. It is matter of law.

No one can doubt, that laws in relation to duties, not inconsistent with the act of 1833, may be considered in giving a construction to that act. But I am yet to learn that such laws, by any construction, can suspend or modify the positive enactments of the act of 1833. Such a power belongs not to the executive nor the judiciary, but to congress.

JAMES BARRY, Plaintiff in Error, v. HAMILTON R. GAMBLE.

3 H. 32.

The first appropriation of the land, under a location of a New Madrid certificate, is the return of the survey, by the surveyor, with a notice of location, to the office of the recorder; but the location could be made on lands before they were offered at public sale.

Where there were conflicting titles to the same land, one being a location under a New Madrid certificate, made in 1818, and confirmed by congress in 1822 and patented in 1827, and the other being an inchoate Spanish title, barred by failure to file notice of the claim pursuant to the act of March 2, 1805, (2 Stats. at Large, 324,) but the bar removed by the act of May 26, 1824, (4 Stats. at Large, 52,) and the title confirmed by a decree of this court after the patent issued for the first-mentioned title, it was *Held*, that as the Spanish title was barred as against the United States, from 1808 to 1824, they might prescribe conditions for removing the bar; that they had done so; and that, by force of a limitation in the acts of 1824 and 1828, (4 Stats. at Large, 298,) the title acquired under the patent in 1827, and the equitable title which preceded the patent, were protected.

ERROR to the supreme court of the State of Missouri, in an action of ejectment, on which the defendant in error was plaintiff. In the court below the following stipulation was entered on the record.

“ It is agreed that the title of the plaintiff (Gamble) to the land in the declaration mentioned, is the title under the patent issued to Baptiste Lafleur, or his legal representatives, and that the title of the defendant (Barry) is the title under the confirmation to the legal representatives of James Mackay; and if it shall be adjudged that the patent is a better title than the confirmation, then the plaintiff shall recover the land in the declaration mentioned; and if the confirmation shall be adjudged the better title, then the defendant shall have judgment.”

The acts of the parties and of the officers of the government and of congress, and the dates thereof, upon which the titles of the parties depended, are detailed in the opinion of the court.

* During the trial of the cause, the plaintiff asked the [* 36] court to give to the jury the following instructions:—

“ That the title to the premises, in the declaration mentioned, under the patent to Baptiste Lafleur, or his legal representatives, is a better title in law than the title under the confirmation to the legal representatives of James Mackay, deceased; and, therefore, the plaintiff in this case is entitled, under the agreement of the parties, to recover the possession of the land in the declaration mentioned;” which instruction was given by the court and excepted to by the counsel of the defendant.

The defendant, by his counsel, then asked the court to give the following instructions:—

“ That, inasmuch as the confirmation and patent given in evidence by the defendant show the legal estate in the premises to be vested

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in the widow and heirs of Mackay, and inasmuch as the plaintiff has not shown any title under said Mackay, or his representatives, the defendant is entitled to a verdict;" which instructions the court refused to give, and the defendant excepted to such refusal.

The case was carried to the supreme court of the State of Missouri, which, in September, 1842, affirmed the judgment of the court below. Mackay's case, in which his title was confirmed is 10 Pet. 341.

Lawless, for the plaintiff in error.

Spaulding, for the defendant in error.

[*51] * CATRON, J., delivered the opinion of the court.

The first question in order is, whether the patent to Lafleur is a valid title as against the United States when standing alone.

By the certificate of the recorder of land titles at St. Louis, Lafleur was entitled to 640 acres of land in compensation for lands of his injured by the earthquake in New Madrid county. On this, the survey of April, 1815, is founded. Its return by the surveyor, with a notice of location, to the office of the recorder, was the first appropriation of the land; and not the notice to the surveyor-general's office requesting the survey to be made, as this court held in *Bagnell v. Broderick*, 13 Pet. 450.

Township 45, in which the land granted to Lafleur lies, was laid off into sections in 1817 and 1818; and we suppose before the survey for Lafleur was made, as his patent, and the survey on which the patent is founded, both refer to the township by number as including the land. When the return of the township survey was made to the surveyor-general's office does not distinctly appear, although it is probable it was after Lafleur's location had been made with the recorder.

The location was in irregular form, and altogether dis-
[*52] regarded the *section lines, and ordinary modes of entry under the laws of the United States. This circumstance lies at the bottom of the controversy. The general land-office at Washington refused to issue a patent on New Madrid locations thus surveyed. The secretary of the treasury, on the 11th of May, 1820, and again on the 19th of June, 1820, called on the attorney-general for his opinion on the validity of such locations, (2 Land Laws and Opinions, 9, 10,) this officer replied: "That the authority given is, to make these locations on any of the public lands of the territory,

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the sale of which is authorized by law ; but the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by these sufferers are unauthorized."

To cure this defect, the act of 1822¹ was passed, which provides, that locations made before that time, under the act of 1815,² if made in pursuance of the act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional and quarter-sectional lines of the public surveys ; and that the fractions previously created by such locations should be deemed legal fractions, subject to sale. But that after the passing of the act, (26th April, 1822,) no location of a New Madrid claim should be permitted that did not conform to the sectional and quarter-sectional lines. The opinion of the attorney-general appears to have been favorable to locations in conformity to the public surveys actually made before their return ; until returned, however, and received at the surveyor-general's office, they could not be recognized as legal public surveys and in this sense congress obviously acted on the opinion and course of the general land-office in pursuance of it.

The principal difficulties standing in the way of issuing patents, seem to have been the following : There were New Madrid locations made on lands not then surveyed ; locations made after the lands had been surveyed, but before the surveys were returned ; and locations made on lands surveyed, and the surveys returned ; in each case, disregarding of the section lines. But all of them were on lands that had been surveyed, and the surveys duly returned and sanctioned when the act of 1822 was passed. On this state of facts congress acted. No distinction was made among the claimants ; all fractions created by prior locations, in existing public surveys, were declared legal, and subject to sale ; the fractions produced could not be legal unless the locations producing them were equally so. In this respect, therefore, such locations were binding on the United States from the date of the act. It is insisted, however, that until section No. 45 had been offered for sale by the proclamation of the President, no entry could be made on it by a New Madrid warrant ; and in this respect Lafleur's location was void before, and not cured by, the act of 1822, but expressly excepted ; that congress only acted on one defect, that of disregarding the sectional lines, and excluded all others. Township No. 45 was first advertised for sale in 1823.

* In addition to what has been said in answer to the [*53] argument, it may be remarked, that the New Madrid suffer-

¹ 3 Stats. at Large, 668.

² Ib. 211.

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ers were preferred claimants; like others having a legal preference, that had a right to buy, so soon as the officers of the government had by law the power to sell, and sales could be made founded on public surveys. It could not have been intended by congress that the sufferer should surrender his injured claim, get his warrant from the recorder, and then be compelled to wait until after the public sale, which might sweep all the lands out of which he could obtain a new home. And so the act of 1815 was construed and acted on at the general land-office. No objection seems to have been made there on the ground that these claims had been entered on lands not previously offered for sale at auction, as the President might or might not order the sale. We think this plainly inferable from the following order. On the 9th of April, 1818,¹ an act was passed limiting applications to the recorder, for New Madrid warrants of survey, to the 1st of January, 1819. The commissioner of the land-office here, wrote to the recorder at St. Louis, inclosing a copy of the act, a few days after it was passed, saying:—

“This act authorizes the reception of claims to the 1st of January next; but as several public sales will take place previous to that day, you must not issue any patent certificates to those claimants after the commencement of such sales, unless the claimant produces a certificate from the register of the land-office to show that the land has not been sold. Should you issue any patent certificate to those claimants previous to the public sales, you will furnish the register of the land-office for the district in which the lands lie with a list of the tracts for which you have issued patent certificates, that he may reserve them from sale.”

The 3d section of the act of 1815, makes it the duty of the recorder to deliver to the claimant a certificate stating the circumstances of the case; that is, that the claim had been allowed, surveyed, and recorded in due form, and that he was entitled to a patent for the tract designated; this was to be filed with the recorder if satisfactory to the claimant. Then the recorder was bound to issue the “patent certificate,” above spoken of, in favor of the party, which, being transmitted to the commissioner of the general land-office, entitled the claimant to a patent from the United States.

By the foregoing instructions, patent certificates, previous to the public sales, were contemplated as due to claimants for lands entered but not previously offered for sale, and we cannot doubt did exist in large numbers. They, of course, were sanctioned at the land-office. Nor is the consideration of this question presented to this court for

¹ 3 Stats. at Large, 417.

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the first time. Peltier's claim, in the case of *Stoddard v. Chambers*, 2 How. 317, was like this in all its features except one. It had been located on the same land covered by Bell's concession made by the Spanish government, which had been filed and recorded in *1808, but not recommended for confirmation by the com- [* 54] missioners at St. Louis, for want of occupation and cultivation. By the act of 1811,¹ until the decision of congress was had, the land covered by the Spanish claim could not be offered for sale, and this restriction was continued. Peltier's New Madrid location was made in 1818, on the land reserved from sale in favor of Bell's concession, and this court held the New Madrid location, and the patent founded on it, void, because the sale of the land "was not authorized by law," and the title of Peltier in violation of the act of 1815. But the court says: "Had the entry been made or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832,² the title of the defendant could not be contested."

For the reasons assigned, the court was of opinion Peltier's claim would have been valid, had Stoddard's not been interposed. It also lies in township No. 45. So our opinion is, that Lafleur's claim was rendered valid by the act of 1822, unless it can be overthrown by the interposition of Mackay's.

2. This raises the inquiry into its validity in opposition to Lafleur's. That, standing alone, Mackay's was valid against the United States, is in effect decided by this court in *Pollard v. Kibbe*, 14 Pet. 355, and *Pollard v. Files*, 2 How. 601, and is free from doubt.

Lafleur's location was made in 1818, and his patent issued in 1827. Mackay's claim was first filed for adjudication before the district court (U. S.) of Missouri in 1829. Up to this date it had stood as an incomplete claim, requiring confirmation by this government before the title could pass from the United States; to accomplish which a decree in its favor was sought in the district court, and finally obtained here on appeal; in conformity to which a patent was obtained.

As the proceeding under the act of 1824 was *ex parte*, Lafleur was not bound by it any further than the legislation of congress affected his rights; and the question is, how far were they protected as against incomplete titles brought before the district court.

By the act of March 2, 1805, § 4, certain French and Spanish claimants were directed, on or before the 1st day of March, 1806, to deliver to the register of the land-office, or recorder of land titles,

¹ 2 Stats. at Large, 617.² 4 Ib. 565.

within whose district the land might lie, every grant, order of survey, deed, conveyance, or other written evidence of claim, to be recorded in books kept for the purpose. "And if," says the act, "such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the first two sections of this act, shall become void, and forever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence, in any court [*55] *of the United States, against any grant derived from the United States."

By the act of April 21, 1806,¹ § 3, supplemental to the act of 1805, the time for filing notices of claims and the evidence thereof, was extended to the 1st day of January, 1807; but the rights of such persons as shall neglect so doing within the time limited by the act, it was declared should be barred, and the evidence of their claims never after be admitted as evidence; in the same manner as had been provided by the 4th section of the act to which that was a supplement.

By the 5th section of the act of March 3, 1807,² further time for filing notices and evidences of claims was given till the 1st day of July, 1808. But all benefit was cut off from the claimant if he failed to give notice of his claim, and file his title papers, so far as the acts of congress operated in giving the title any sanction through the agency of commissioners, and ever after the 1st of July, 1808, the claim was barred.

It is insisted, however, Mackay's claim is not embraced by the act of 1805, and to which the acts of 1806 and 1807 refer. The act of 1805 does govern the future legislation, interposing a bar. By section 4, French or Spanish grants made and completed before the 1st day of October, 1800, might or might not be filed; as the treaty of 1803³ confirmed them, they needed no further aid. But complete grants issued after the 1st day of October, 1800; and incomplete titles, bearing date after that time, "shall be filed," says the act. Mackay's claim is of neither description, it was an incomplete title; being a permit to settle and warrant of survey without any settlement or survey having been made, but dated before the 1st of October, 1800.

The act of 1805, section 4, further provides, that every person claiming lands by virtue of the first two sections of that act, should, by the 1st day of March, 1806, file his notice of claim, title papers, &c.

¹ 2 Stats. at Large, 391.

² 2 Ib. 440.

³ 8 Ib. 200.

otherwise the claim should be barred. Mackay's claim "was a duly registered warrant of survey," within the words of the 1st section of the act. That the United States had the power to pass such a law we think free from doubt; it being analogous to an ordinary act of limitation, as this court held in *Strother v. Lucas*, 12 Pet. 448, to which nothing need be added here.

As to the United States, and all persons claiming under them, Mackay's claim stood barred from the 1st of July, 1808, until the passing of the act of May 26, 1824, by which the bar was removed, so far as the government was concerned. The time for filing claims under this act was extended by another passed in 1826,¹ and again by that of May 24, 1828, to the 26th day of May, 1829; before the expiration of which time Mackay's claim was filed in the district court (U. S.) of Missouri, and eventually confirmed in this court on appeal. And the question is, did the acts of 1824 and 1828, and *the proceeding had under them, affect Lafleur's title. [* 56] By the 11th section of the act of 1824, it is provided: "That if in any case it shall so happen, that the lands, tenements, or hereditaments decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, it shall be lawful for the party interested to enter the like quantity of lands, in parcels conformable to sectional divisions and subdivisions, in any land-office in the State of Missouri."

The act of 1828, to continue in force the act of 1824 for a limited time, and to amend the same, declares, in section 2: "That the confirmations had by virtue of said act, and the patents issued thereon, shall operate only as a relinquishment of title on the part of the United States, and shall nowise affect the right or title, either in law or equity, of adverse claimants of the same land."

The foregoing are the conditions on which the bar was removed; these congress certainly had right to impose, and thereby give a preference to an intervening title acquired during the existence of the bar.

Lafleur was a claimant with a good title in equity, when the act of 1824 was passed; this he well might perfect into a patent, as his equity was expressly protected by the act of 1828, and by implication in that of 1824, section 11; neither the patent nor entry was affected by the proceedings had on Mackay's claim in the district court of Missouri, and in this court, nor by his patent issued pursuant thereto. It follows, Lafleur's is the better title, and that the decision of the supreme court of Missouri must be affirmed.

¹ 4 Stats. at Large, 158.

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M'KINLEY, J. I dissent from the opinion of the majority of the court, in this case, for the following reasons:—

1. According to the act of the 17th of February, 1815, c. 198, "persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized to locate the like quantity of land on any of the public lands of said territory, the sale of which is authorized by law." The section lines of the land had not been run on the 7th of July, 1817, when the location on the New Madrid certificate, under which Gamble claims, was made. The sale of the land, including this location, was not authorized by law until the year 1823. The 1st section of the act of the 26th April, 1822, c. 40, could not have legalized the location, because the land was not then subject to sale; and because that section only authorized grants to issue in like manner, as if the location had conformed to the sectional or quarter-sectional lines of the public surveys, if

made in other respects in pursuance of the act of the 17th of [*57] February, 1815. Now, as the location had not been *made in pursuance of that act, and as the 2d section of the act of the 26th of April, 1822, declared, "that hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional and quarter-sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit, and all such warrants shall be located within one year after the passage of this act, in default whereof the same shall be null and void," and as no location and survey were made in conformity with the 2d section, the warrant, survey, and patent, are utterly void. See *Lindsey v. Miller*, 6 Pet. 675.

2. The decree confirming the claim of Mackay's heirs, by the supreme court of the United States, under the treaty, was a full and ample admission that the United States had no right to the land covered by that claim. The title which they acquired to this land, under the treaty, was, therefore, held by them in trust for Mackay's heirs, or any other person having a better title, under the treaty. The decree of confirmation related back to the date of the concession by the Spanish government to Mackay, and made the title as complete as if it had been completed by that government before the treaty, notwithstanding the several intervening acts of limitation passed by congress.

3. The location, survey, and patent, under which Gamble claimed, being void, the 11th section of the act of the 26th of May, 1824, c. 173, did not apply to this case. Because, in the language

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of the section, it did not "so happen that the land" had been sold or otherwise disposed of by the United States. Therefore, Mackay's heirs, or those claiming under them, were not authorized, and much less bound to enter other land in lieu of that confirmed and granted to them by the decree and patent.

Mr. Justice STORY, and Mr. Justice WAYNE concur in these reasons.

4 H. 449; 8 H. 345; 12 H. 59; 6 Wal. 142.

JAMES A. and LEVI DICKSON, Plaintiffs, v. WILLIAM H. WILKINSON,
Administrator of JOHN T. WILKINSON, deceased.

3 H. 57.

A *fi. fa.* having issued, to be levied of the assets of the testator, and been returned *nulla bona*, upon suggestion that assets had come, &c., a *scire facias* issued, and the administrator suffered a judgment by default to be levied of the goods, &c., in his hands to be administered; upon this judgment a *fi. fa.* issued and was returned *nulla bona*. Thereupon, another *scire facias* issued to have judgment *de bonis propriis*. Held,—that, on a demurrer taken to pleas to this last *scire facias*, the defendant could not avail himself of the want of an averment in the first *scire facias*, that goods, &c., had come to the hands of the defendant to be administered, *since the original judgment*.

The effect of a demurrer reaches no further back than proceedings *in fieri*.

THE material facts are stated in the opinion of the court.

Francis Brinley, for the plaintiffs.

No counsel *contra*.

* M'KINLEY, J., delivered the opinion of the court. [* 60]

This case is brought before this court upon a certificate of division of opinion of the circuit court for the middle district of Tennessee.

The plaintiffs had judgment against the defendant for \$1,169.88 debt, and \$110.94 damages. "And it appearing to the satisfaction of the court, by the admission of the plaintiffs, that no assets of the intestate had come to the hands of the defendant," it was adjudged, that the plaintiffs have "execution to be levied of the goods and chattels, and assets, which might thereafter come to the hands of the defendant to be administered." Upon this judgment a *fi. fa.* issued, to be levied of the assets of the testator, which might thereafter come to the hands of the defendant to be administered; which *fi. fa.* was returned by the marshal *nulla bona*. On the 10th day of January, 1839, a *scire facias* issued against the defendant, upon suggestion that assets of the intestate, sufficient to satisfy the judgment, had

come to the hands of the defendant. Upon this *scire facias* there was judgment against the defendant by default, to be levied of the goods and chattels of the intestate, in his hands to be administered. A *fi. fa.* issued upon this judgment, which was also returned *nulla bona*.

And thereupon another *scire facias* issued against the defendant to have judgment against him *de bonis propriis*, to which he pleaded, first, *plene administravit*; secondly, that no assets ever came to his hands; and thirdly, that the estate of the intestate was insolvent at the time the letters of administration were granted; and that in pursuance of the act of the general assembly in such case made and provided, he had suggested to the clerk of the county court, the insolvency of said estate, &c. To these pleas the plaintiffs demurred, and in argument the counsel for the defendant insisted "that the judgment by default upon the first *scire facias* did not establish the fact, that any goods, &c., had come to the hands of the defendant, since the judgment of assets *quando acciderint*; because the said first *scire facias* did not aver that goods, &c., had come to the defendant's hands since the said judgment *quando*; but only
[* 61] that said * goods, &c., had come to his hands, without saying when; and a judgment by default only admits such facts as are alleged. That unless the record showed that assets had come to his hands since the judgment *quando*, and that such assets had been wasted, no execution could issue against the defendant, to be levied *de bonis propriis*." And the counsel for the plaintiffs insisted "that the alleged defect in the first *scire facias*, should have been taken advantage of at the first term to which it was returnable, by plea or demurrer; that the judgment by default was a waiver of errors in the process; and so the error, if it be one, could not be reached by the demurrer."

"And upon said point, whether advantage could be taken of the aforesaid defective averment in the first *scire facias*, upon the plaintiff's demurrer to the defendants' pleas to the second *scire facias*, the opinions of the judges were opposed."

A *scire facias* is an action to which the defendant may plead any legal matter of defence. And in this case the defendant might have pleaded the same matter in bar to the first *scire facias*, which he offered to plead to the second. Or if he considered the first *scire facias* insufficient in law, he might have demurred to it. Having done neither, judgment by default was properly taken against him. And it is well settled, that a judgment by default against an executor or administrator, is an admission of assets to the extent charged in the proceeding against him, whether it be by action on the original

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judgment or by *scire facias*. Ewing's Executors v. Peters, 3 Term R. 685; The People v. The Judges of Erie, 4 Cowen, 446. Failing to make the money out of the assets of the intestate, on the first *scire facias*, the plaintiffs prosecuted the second to have judgment against the defendant, to be levied of his own proper goods, &c. To this he pleaded the three pleas before mentioned.

It is a universal rule of law, that if the party fail to plead matter in bar to the original action, and judgment pass against him, that he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*, see the authorities above cited. The demurrer of the plaintiffs to the defendant's pleas was, therefore, well taken. And although either party may, on a demurrer, take advantage of any defect or fault in pleading in the previous proceedings in the suit, the demurrer can reach no further back than the proceedings remain *in fieri*, and under the control of the court. The judgment on the first *scire facias*, although ancillary to the original judgment, and the foundation of the proceeding on the second *scire facias*, was, nevertheless, a final judgment, and, in that count, conclusive upon the parties; and opposed an insuperable bar to any plea of either party, whether of law or of fact, designed to go beyond it.

It is the opinion of this court, therefore, that advantage could not be taken of any defective averment in the first *scire facias*, upon the demurrer of the plaintiffs to the pleas of the defendant; which is ordered to be certified to said circuit court.

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**JOHN WALKER, Plaintiff in Error, v. THE PRESIDENT AND DIRECTORS
OF THE BANK OF WASHINGTON, Defendant in Error.**

3 H. 62.

If a bank engage to discount a note, and receive the note and allow the maker to draw checks against the proceeds of the discount, it is not usury to treat the loan as made on the day when the note was received, although the proceeds of the discount were not placed to the credit of the maker on the books of the bank until a subsequent day, because the maker did not furnish to the bank till then, certain collateral security for the loan, which he had agreed to give.

If the question of usury depends on written papers, it is for the court to determine it.

Where a witness states facts, and his inferences, it is proper to instruct the jury that they must determine from the facts whether the inferences are correct.

A new security, given to the lender, for the same usurious loan, is void.

ERROR to the circuit court of the United States for the District of Columbia. The material facts are stated in the opinion of the court. The instruction referred to at the close of the opinion, was as follows:—

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[* 65] * “ The defendant asked the cashier of the plaintiffs, who was sworn as a witness in the said cause, whether the amounts drawn out of bank by the defendant previous to 22d February, 1840, as aforesaid, were not charged on the books of the plaintiffs as overdrafts, and were not allowed as the personal credit of the defendant.

“ Whereupon the said cashier answered, that he had no doubt but that the defendant was allowed to check upon said note of 6th February, 1840, before the same was entered to his credit on the books of the bank. And being further asked for the reasons of this opinion, by the defendant’s counsel, he stated that he had no recollection of said note’s being in bank previous to the 18th February, 1840, or of its existence, or of any arrangement with reference to it previous to that date ; and that the said amounts, so checked out previous to 22d February, 1840, would not have been paid on defendants checks, but for the knowledge, on the part of the said cashier, that he (defendant) had a large contract with the navy department for the supply of beef, and that, for antecedent liabilities, the defendant had given to plaintiffs good collateral security ; from which, however, no surplus resulted after paying said liabilities ; and that the said advances made to the defendant after the 6th February, 1840, and previous to the 22d February, 1840, were made on security given or to be given ; but he does not know of any security given during that time, except the defendant’s letter of 30th January, 1840, a bill of sale, by defendant to plaintiffs, of his barrelled beef, dated 20th February, 1840, and the two acceptances of the navy agent, dated 19th February, 1840, and 2d April, 1840, and the note, dated 6th of February, 1840, of which the said cashier has no recollection until the 18th of February, 1840 ; and that he is satisfied that said advances were not made on the personal credit of defendant. And, from all the above circumstances, he has no doubt that said note of 6th February, 1840, was in bank from the time of its date, and that defendant was allowed to check on said note from the day of its date.

“ Whereupon the defendant moved the court to instruct the jury that the facts mentioned by said cashier are evidence in said cause, but the inferences or opinions of said cashier are not evidence ; but the court refused to give such instructions as prayed, but instructed the jury that the inferences or opinions of said witness are not of themselves evidence of the facts so inferred, but that the

[* 66] facts stated * by the witness, as the ground of his inference or opinion, are competent to be given in evidence to the jury, together with the inference or opinion of the said witness ; from

which facts the jury are to judge whether such inferences and opinion are justified by the facts thus stated."

Brent, for the plaintiff in error.

[* 71]

Hellen, for the defendants in error.

WAYNE, J., delivered the opinion of the court.

This suit is brought upon a promissory note, given in renewal of a former note, which had been discounted by the defendants in error. The defendants in the court below deny that the plaintiffs have any right of action upon the note sued on, on the ground that the first note was tainted with usury.

Such is the law in such a case. The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void. *Tuthill v. Davis*, 20 J. R. 285; *Reed v. Smith*, 9 Cow. 647, and the cases of *Sauerwein v. Brunner*, 1 Harr. & Gill. 477; *Thomas v. Catheral*, 5 Gill & Johns. 23, decided in the courts of appeal in Maryland, under the statute of which State, it is said, the note now sued upon is void. But such is not the case before us. The defendant, Walker, had entered into a contract with the United States to supply the navy with beef; and to enable himself to do it, he applied to the bank, by letter dated the 30th January, for a loan of \$25,000, and offered as a security a draft upon E. Kane, the navy agent, and also to assign to the bank the beef which he might put up. The bank accepted his offer, but before Walker gave the draft upon Mr. Kane, or made the assignment, he drew his note on the 6th day of February, seven days after he had written his letter asking for a loan, for \$10,000, at ninety days, and handed it into bank; which note, at maturity, was renewed by the note of the 9th May, now in suit. This note, however, was not discounted until the 18th February, and when then done, the proceeds were not passed to his credit until the 22d. The cause of the delay, in both particulars, the proof in the case shows, was, that Walker did not, until the 19th of February, draw his draft upon the navy agent, as he had proposed to do, or make an assignment of the beef to the bank, until the 20th. He may or may not have passed the navy agent's acceptance to the bank on the day it is dated, or have delivered his deed for the beef the day after; but between those days and the 22d inclusive, he did so, and the bank's

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security being then in its possession as he had offered it, [* 72] the proceeds* of his \$10,000 note was, on the last-mentioned day, passed to his credit. But, in the mean time, Walker had drawn out of the bank, upon his checks, more than \$7,000, with which he was debited when the proceeds of his note were carried to his credit; which sum, and the interest upon it, computed for ninety-four days from the date of the note, left a balance to his credit of \$997.86. The computation of the interest from the 6th February, instead of from the day when the proceeds were carried to his credit, is the usury complained of. The letter of the defendant of the 30th January, asking for the loan of \$25,000; the acceptances of his drafts upon the navy agent by that officer, and the defendant's assignment to the bank of certain portions of the beef which he had on hand, and which he might put up under his contract with the United States, and which assignment was not executed until the 20th February, were in evidence before the court below. The assignment recites the defendant's contract with the United States, so far as it was necessary to introduce the contract which he was about to make in it with the bank; then his indebtedment to the bank for loans and discounts, his intention to secure the payment of the money due by him, and all drafts, note, or notes that have been given for the same, or might be afterwards given by way of substitution or renewal of such drafts or notes, or any of them, &c., &c., and then states that the money which had already been advanced or loaned, or which might afterwards be advanced or loaned by the bank to the defendant, being for the purpose of enabling him to fulfil his contract with the United States. Now, the proof is positive, on both sides, that the note sued on was given in renewal of the note of the 6th February, which had first been given under his proposal for a loan, and that it was intended to be the note, the payment of which was to be secured by the assignment. Such being the evidence, the court correctly refused every instruction which was asked to refer the question of usury to the jury as a fact. It was a case of a written contract, in which the court had the exclusive power of deciding whether it was usurious or not. *Levy v. Gadsby*, 3 Cranch, 180. But, if it were not so, we think the instructions, as they were asked, could not have been given by the court to the jury. Each of them called upon the court to give an opinion upon the sufficiency of the evidence, and in all of them, except the eighth, there was a separation of the facts from the entire evidence, so as to bring them under the cases of *Scott v. Lloyd*, 9 Pet. 418; *Greenleaf v. Birth*, 9 Pet. 292; and that of the *Chesapeake and Ohio Canal Co. v. Knapp*, 9 Pet. 541. Nor do we think that there was any error in the instruction

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given by the court to the jury under the defendant's first prayer. The court sufficiently distinguish between the facts of the cashier's evidence and his belief, and tell the jury that they are to determine by the facts whether the cashier's inferences were justified.

The judgment of the court is affirmed.

WILLIAM HENDERSON, Plaintiff in Error, v. JOHN ANDERSON.

3 H. 73.

The decision in 6 P. 51, and 8 P. 12, that a party to a negotiable instrument cannot be a witness to invalidate it, affirmed.

THE case is stated in the opinion of the court.

Conrad, for the plaintiff.

No counsel *contra*.

* DANIEL, J., delivered the opinion of the court. [* 78]

Upon a writ of error to the circuit court of the United States for the eastern district of Louisiana.

This was an action instituted at law in the circuit court for the eastern district in the State above mentioned, by petition, according to the modes of proceeding in the courts of that State, in the name of the defendant in error, as indorsee and holder of a bill of exchange for \$3,795, against the plaintiff in error, as an indorser of that bill.

The petition sets forth the facts following: That the petitioner is the holder and owner of the bill in question, which was drawn by one Thomas J. Green, at Warrenton, Mississippi, on the 3d of * February, 1837, directed to Briggs, Lacoste, and Com- [* 79] pany, at Natchez, payable twelve months after date, to John Henderson and Company, by whom it was indorsed. That on the 8th day of February, 1837, this bill was protested for non-acceptance, and on the 6th day of February, 1838, was duly protested for non-payment in the city of Natchez, and that John Henderson and Company were regularly notified of said protests for non-acceptance and non-payment. That at the time at which the said bill was so indorsed, the plaintiff in error was a member of the firm of John Henderson and Company, then doing business at Warrenton in Mississippi, and as a member of that firm is liable to the petitioner for the amount of the bill of exchange, with interest, costs, and damages. That the petitioner is a citizen and resident of the State of Kentucky, and the said William Henderson a citizen and inhabitant of

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the parish of Carroll, in the State of Louisiana. Upon the foregoing petition the plaintiff below prayed judgment, with his costs, &c.

The defendant below, in the first place, took an exception to the petition on the ground that he had not been served with a true copy thereof, according to law, nor had been legally cited to appear, and therefore prayed to be dismissed; secondly, he interposed what is there styled "the general denial," corresponding with the general issue; and thirdly, he averred specially, that he neither signed nor indorsed the said bill himself, nor in any way authorized the name of the firm of John Henderson and Company to be signed and indorsed on the same; that it was so signed and indorsed by one John Henderson without the knowledge and consent of the defendant, and without any authority whatsoever; and that such indorsement was made neither for the benefit, nor for any debt or liability of the defendant, nor of the said firm; nor was it made within the scope of the partnership powers, or on account of the firm; but that without any due authority, and without the knowledge and consent of the defendant, the bill was signed and indorsed by said John Henderson, purely for the benefit of the said Thomas J. Green, the drawer, of all which the parties to the said bill, and the holders thereof, before and after the maturity thereof, had notice.

At a subsequent day, the exception first taken for the alleged want of regular service of the petition was waived by the defendant, and the cause was continued; afterwards, upon the trial thereof, the defendant, in order to prove the allegations in his answer to the petition, offered in evidence the deposition of John Henderson, who, at the time of the drawing and indorsement of the bill of exchange sued on, was a copartner with the defendant in the firm, doing business under the name and style of John Henderson and Company; this evidence being designed to show that John Henderson indorsed the partnership name upon the bill without authority, without the knowledge or consent of the defendant, and contrary to their articles of copartnership and to the course of their dealings; and that

[* 80] it was so indorsed, in the presence of the plaintiff, purely for the accommodation of the drawer, Thomas J. Green, and not for the accommodation, nor on account of, nor in any manner for the benefit of the firm of John Henderson and Company. The reception of this deposition was objected to on the ground that John Henderson, as a member of the firm by whom and at the time the indorsement was made, was incompetent to testify to facts tending to invalidate the bill; the court sustained this objection, and rejected the deposition of John Henderson. To the ruling of the court on this point the defendant took an exception, which was reserved to him.

Poultney v. City of Lafayette. 3 H.

The exception thus taken presents the whole controversy in this case, which, controlled by principles heretofore ruled by this court, would seem to be limited within a very narrow compass. The inquiry how far a party to a negotiable instrument may be heard in a court of law to impeach or invalidate that instrument in the hands of another, is one which has led to considerable discussion and to different conclusions in the courts both of England and in this country. In the case of *Walton, assignee, &c., v. Shelly*, 1 T. R. 296, the court of king's bench decided that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal. Subsequently, by the same court, this rule was so far relaxed or abrogated as to permit the impeachment of such an instrument by persons standing in the same relation to it. *Vide Jordaine v. Lashbrooke*, 7 T. R. 601. Amongst the different States of our Union the decisions of the court of king's bench on either side of this question have been adopted. In this court, the rule laid down in the case of *Walton v. Shelly* has been admitted and adhered to with a uniformity which establishes it as the law of the court. Thus, in the case of *The Bank of the United States v. Dunn*, 6 Pet. 51, it was enforced in an action by the holder of a note against an indorser, in which an attempt was made to impeach the note upon the testimony of a subsequent indorser; in the case of *The Bank of the Metropolis v. Jones*, 8 Pet. 12, in which the maker of a note was deemed an incompetent witness, in an action by the holder, to testify to facts in discharge of the liability of the indorser; and in the case of *Scott v. Lloyd*, 12 Pet. 45, the decision of this court, though not directly upon the same point, may be regarded as approving the rule established by the cases previously adjudicated. The judgment of the circuit court for the eastern district of Louisiana now under review, being fully sustained by these authorities, that judgment is hereby affirmed.

1 Wal. 166.

EMILY POULTNEY *et al.* Appellants, v. THE CITY OF LAFAYETTE,
ISAAC T. PRESTON, *et al.* Defendants.

3 H. 81.

If a circuit court misconstrue one of the rules made by this court, for regulating the equity practice of circuit courts, and dismiss the bill, this court will, upon appeal, reverse the decree and remand the cause for further proceedings.

THE case is stated in the opinion of the court.

Kendall v. Stokes. 3 H.

Chinn, for the appellants.*Coxe*, contra.

[* 86] * M'LEAN, J., delivered the opinion of the court.

This is an appeal from the decree of the circuit court for the eastern district of Louisiana.

To determine the point brought up by the appeal, it is unnecessary to state the substance of the bill or answers. On motion, the

circuit court dismissed the bill, under the 21st rule, because [* 87] the * "complainants had not set down for hearing the pleas filed in this case, nor filed replication to the answers, although more than two terms of the court had elapsed since filing of the same."

The rule referred to is: "If the plaintiff shall not reply to, or set for hearing any plea or demurrer before the second term of the court after filing the same, the bill may be dismissed, with costs." No plea had been filed in the case, and the demurrer filed had been overruled, so that the rule did not apply to the case as it stood at the time of the dismissal. The rule can only apply to demurrers and pleas technically so called. And there is no other rule of proceeding which authorized the decree of the court. The complainant may, if he choose, go to the hearing on the bill and answer.

The decree of the circuit court is reversed, and the cause is remanded for further proceedings.

AMOS KENDALL, Plaintiff in Error, v. WILLIAM B. STOKES, LUCIUS W. STOCKTON, and DANIEL MOORE, Survivors of RICHARD C. STOCKTON, Defendants in Error.

3 H. 87.

After an award, and the receipt of the money awarded, an action for the original cause cannot be maintained upon the ground that the claimant did not claim or prove before the referee all the damages he had sustained.

A public officer is not liable to an action for an honest mistake, made in a matter where he was obliged to exercise his judgment, though an individual may suffer from his mistake.

An application by a private person for a writ of *mandamus*, proceeds upon the ground that he has no other adequate remedy; and after the *mandamus* has been awarded, the applicant cannot have an action on the case for the same cause for which the *mandamus* was granted, though he may for disobeying the *mandamus*.

If a postmaster-general wrongfully refuse to give a credit to a contractor, and if the latter should be entitled to his action for damages, he cannot recover special damages for detention of the money, beyond interest.

THE case is stated in the opinion of the court.

Dent and Jones, for the plaintiff.

Coxe, contra.

* TANEY, C. J., delivered the opinion of the court. [* 93]

The record in this case is very voluminous, and contains a great mass of testimony, and also many incidental questions of law not involving the merits of the case, which were raised and decided in the circuit court, and to which exceptions were taken by the plaintiff in error. But both parties have expressed their desire that the controversy should now be terminated by the judgment of this court; and that the leading principles which must ultimately decide the rights of the parties should now be settled; and

that the case should * not be disposed of upon any techni- [* 94] cal or other objections which would leave it open to further litigation. In this view of the subject it is unnecessary to give a detailed statement of the proceedings in the court below. Such a statement would render this opinion needlessly tedious and complicated. We shall be better understood by a brief summary of the pleadings and evidence, together with the particular points upon which our decision turns; leaving unnoticed those parts of the record which can have no influence on the judgment we are about to give, nor vary in any degree the ultimate rights of the parties.

At the time of the trial and verdict in the circuit court, the declaration contained five counts. But after the verdict was rendered, the plaintiffs in that court, with the leave of the court, entered a *nolle prosequi* upon the second, third, and fourth, and the judgment was entered on the first and the fifth. It is only of these two last mentioned counts, therefore, that it is necessary to speak. The verdict was a general one for the plaintiffs, and their damages assessed at \$11,000.

The first count states that by virtue of certain contracts made with William T. Barry, while he was postmaster-general, and services performed under them, the plaintiffs, on the first of May, 1835, were entitled to receive and have allowed to them the sum of \$122,000, and that that sum was accordingly credited to them on the books of the post-office department; and that Amos Kendall, the defendant in the court below, afterwards became postmaster-general, and as such illegally and maliciously caused the items composing the said amount to be suspended on the books of the department, and the plaintiffs to be charged therewith; whereby they were greatly injured, and put to great expenses, and suffered in their business and credit.

Kendall v. Stokes. 3 H.

The fifth count recites the act of congress of July 2, 1836,¹ by which the solicitor of the treasury was authorized to settle and adjust the claims of the plaintiffs for services rendered by them under contracts with William T. Barry, while he was postmaster-general, and which had been suspended by Amos Kendall, then postmaster-general, and to make them such allowances therefor, as, upon a full examination of all the evidence, might seem right and according to principles of equity; and the postmaster-general directed to credit them with whatever sum or sums of money the solicitor should decide to be due to them, for or on account of such service or contract; and after this recital of the act of congress, the plaintiffs proceed to aver that services had been performed by them under contracts with William T. Barry, while he was postmaster-general, on which their pay had been suspended by Amos Kendall, then postmaster general, and that for these claims the solicitor of the treasury allowed the plaintiffs large sums of money amounting to \$162,727.05;

that the defendant had notice of the premises, and that it [* 95] became his * duty as postmaster-general to credit the plaintiffs with this sum; but that he illegally and maliciously refused to give the credit, by reason whereof the plaintiffs were subjected to great loss, their credit impaired, and they were obliged to incur heavy expenses in prosecuting their rights, to their damage in the sum of \$100,000.

The defendant plead not guilty, upon which issue was joined.

At the trial, the plaintiffs offered in evidence the record of the proceedings in the *mandamus* which issued from the circuit court, upon their relation, on the 7th day of June, 1837, commanding the said Amos Kendall to enter the credit for the sum awarded by the solicitor. It is needless to state at large the proceedings in that suit, as they are sufficiently set forth in the report of the case in 12 Pet. 524; the judgment of the circuit court, awarding a peremptory *mandamus*, having been brought by writ of error before the supreme court, and there affirmed at January term, 1838. 12 Pet. 524. Various papers and letters were also offered in evidence by the plaintiffs, to show that the allowances mentioned in the declaration had been suspended by the defendant; and that after the award of the solicitor, and before the original *mandamus* issued, he had refused to credit \$39,472.47, part of the sum awarded, upon the ground that the items composing it were not a part of the subject-matter referred; and upon which, as the defendant insisted, the solicitor had no right to award. Other papers and letters were also offered, showing that

¹ 6 Stats. at Large, 665.

after the judgment of the circuit court awarding a peremptory *mandamus* had been affirmed in the supreme court, the plaintiffs demanded a credit for the above-mentioned balance on the 23d of March, 1838; that the defendant declined entering the credit, alleging that a recent change in the post-office law had placed the books and accounts of the department in the custody of the auditor; and some difficulty having arisen on this point, the circuit court, on the 30th of March, 1838, issued a *mandamus* commanding the postmaster general to enter the credit on the books of the department; and to this writ the defendant made return on the 3d of April, 1838, that the said credit had been entered by the auditor, who had the legal custody of the books.

The whole of this evidence was objected to by the defendant, but the objection was overruled, and the testimony given to the jury. And upon the evidence so offered by the plaintiffs, before any evidence was produced on his part, the defendant moved for the following instruction from the court: —

“The defendant, upon each and every of the plaintiffs’ said counts, severally and successively prayed the opinion of the court, and their instruction to the jury that the evidence so as aforesaid produced and given on the part of the plaintiffs, so far as the same is competent to sustain such count, is not competent and sufficient to be left to the jury as evidence of any act or acts done or omitted or refused to be done by the defendant, which legally laid him liable * to the plaintiffs in this action, under such count, for the [* 96] consequential damages claimed by the plaintiffs in such count.” This instruction was refused, and the defendant excepted.

The question presented to the court by this motion in substance was this: Had the plaintiffs, upon the evidence adduced by them, shown themselves entitled in point of law to maintain their action, for the causes stated in their declaration upon the breaches therein assigned, assuming that the jury believed the testimony to be true?

The instruction asked for was in the nature of a demurrer to the evidence, and in modern practice has, in some of the States, taken the place of it. In the Maryland courts, from which the circuit court borrowed its practice, a prayer of this description, at the time of the session of the district and for a long time before, was a familiar proceeding, and a demurrer to evidence seldom if ever resorted to. And the refusal of the court was equivalent to an instruction that the plaintiffs had shown such a cause of action as would authorize the jury, if they believed the evidence, to find a verdict in favor of the plaintiffs, and to assess damages against the defendant for the causes of action stated in the declaration.

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Now the cause of action stated in the first count is the suspension, by the defendant, of the allowances made by his predecessor in office; and of the recharge of sums with which the plaintiffs had been credited by Mr. Barry, when he was the postmaster-general. And it appeared in evidence, by the proceedings in the *mandamus*, that the plaintiffs being unable to settle with the defendant the dispute between them on the subject, they applied to congress for relief; that upon this application a law was passed, referring the matter to the solicitor of the treasury, with directions that he should inquire into and determine the equity of these claims, and make them such allowances therefor as might seem right, according to the principles of equity; and that the postmaster-general should credit them with whatever sums of money, if any, the solicitor should decide to be due; that the plaintiffs assented to this reference, and offered evidence before the solicitor that they were entitled to the allowances and credits claimed by them; and that, from the conduct of the postmaster-general, in suspending and recharging these allowances and credits, they had been compelled to pay a large amount in discounts and interest, in order to carry on their business; and that the solicitor had finally determined in favor of their claims, and awarded to them the sum hereinbefore mentioned, giving them, as appears in his report to congress, interest on the money withheld from them; and also, that, before this suit was brought, they had obtained a credit on the books of the department for the whole sum awarded by the solicitor.

Assuming, for the sake of the argument, that an action might in the first instance have been sustained against the postmaster-general, can the plaintiffs still support a suit upon the original cause [* 97] of * action? It was not a controversy between the plaintiffs and Amos Kendall, as a private individual, but between them and a public officer acting for and on behalf of the United States. If they had sustained damage, it was the consequence of his act, and the question of damages was necessarily referred with the subject-matter in controversy, out of which that question arose. It was an incident to the principal matters referred, and therefore within the scope of the reference; and it is not material to inquire whether damages for the detention of the money were claimed or not, or allowed or not. In point of fact, however, the plaintiffs did claim interest on the money withheld, as a damage sustained from the conduct of the postmaster-general, and offered proof before the solicitor, of the amount of discounts and interest they had been compelled to pay; and, moreover, were allowed in the award a large sum on that account, which was paid to them as

well as the principal sum. The question, then, on the first count is, can a party, after a reference, an award, and the receipt of the money awarded, maintain a suit on the original cause of action, upon the ground that he had not proved, before the referee, all the damages he had sustained? or that his damage exceeded the amount which the arbitrator awarded? We think not. The rule on that subject is well settled. It has been decided in many cases, and is clearly stated in *Dunn v. Murray*, 9 B. & C. 780. The plaintiffs, upon their own showing, therefore, were not entitled to maintain their action on the first count, and the circuit court ought so to have directed the jury.

The judgment upon this count is also liable to another objection equally fatal. The acts complained of were not what the law terms ministerial, but were official acts done by the defendant, in his character of postmaster-general. The declaration, it is true, charges that they were maliciously done, but that was not the ground upon which the circuit court sustained the action either on this count or the fifth. For, among other instructions moved for on behalf of the defendant, the court were requested to direct the jury:—

“That if they found, from the evidence, that the postmaster-general acted from the conviction that he had lawful power and authority, as postmaster-general, to set aside the extra allowances made by his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so; and if the plaintiffs suffered no injury from such official act but the inconveniences necessarily resulting therefrom, that the defendant was not liable.”

This instruction was refused; the court thereby in effect giving the jury to understand, that however correct and praiseworthy the motives of the officer might be, he was still liable to the action, and chargeable with damages.

We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his * judgment and from a sense of duty, in a mat- [* 98] ter of account with an individual, has been held liable to an action for an error of judgment. The postmaster-general had undoubtedly the right to examine into this account, in order to ascertain whether there were any errors in it which he was authorized to correct, and whether the allowances had in fact been made by Mr. Barry; and he had a right to suspend these items until he made his examination and formed his judgment. It repeatedly and unavoidably happens, in transactions with the government, that money due to an individual is withheld from him for a time, and payment sus-

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pendent, in order to afford an opportunity for a more thorough examination. Sometimes erroneous constructions of the law may lead to the final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable to an action if he falls into error, in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland, v. Ld. Palmerston*, 7 J. B. Moore, 91, 3 B. & B. 275.

The case in 9 Clark & Finnelly, 251, recently decided in England, in the house of lords, has been much relied on in the argument for the defendant in error. But upon an examination of that case, it will be found that it had been decided by the court of session in Scotland, in a former suit between the same parties, that the act complained of was a mere ministerial act, which the party was bound to perform; and that this judgment had been affirmed in the house of lords. And the action against the party, for refusing to do the act, was maintained, not upon the ground only that it was ministerial, but because it had been decided to be such by the highest judicial tribunal known to the laws of Great Britain. The refusal for which the suit was brought took place after this decision; and the learned lords, by whom the case was decided, held that the act of refusal, under such circumstances, was to be regarded as wilful, and with knowledge; that the refusal to obey the lawful decree of a court of justice was a wrong, for which the party who had sustained injury by it might maintain an action, and recover damages against the wrongdoer. This case, therefore, is in no respect in conflict with the principles above stated; nor with the rule laid down in the case of *Gidley v. Ld. Palmerston*.

In the case before us, the settlement of the accounts of the plaintiffs properly belonged to the post-office department, of which the defendant was the head. As the law then stood, it was his duty to exercise his judgment upon them. He committed an error, in supposing that he had a right to set aside allowances for services rendered upon which his predecessor in office had finally [* 99] decided. But as the * case admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided, can give no cause of action against him.

We proceed to the fifth count. But before we examine the cause

of action there stated, it will be proper to advert to the principles settled by this court in the case of the *mandamus* hereinbefore referred to. The court in that case, speaking of the nature and character of the proceeding by *mandamus*, which had been fully argued at the bar, said that it was an action or suit brought in a court of justice, asserting a right, and prosecuted according to the forms of judicial proceeding; and that a party was entitled to it when there was no other adequate remedy; and that although in the case then before them the plaintiffs in the court below might have brought their action against the defendant for damages on account of his refusal to give the credit directed by the act of congress, yet as that remedy might not be adequate to afford redress, they were, as a matter of right, entitled to pursue the remedy by *mandamus*.

Now, the former case was between these same parties, and the wrong then complained of by the plaintiffs, as well as in the case before us on the fifth count, was the refusal of the defendant to enter a credit on the books of the post-office department for the amount awarded by the solicitor. In other words, it was for the refusal to pay them a sum of money to which they were lawfully entitled. The credit on the books was nothing more than the form in which the act of congress, referring the dispute to the solicitor, directed the payment to be made. For the object and effect of that entry was to discharge the plaintiffs from so much money, if on other accounts they were debtors to that amount; and if no other debt was due from them to the United States, the credit entitled them to receive at once from the government the amount credited. The action of *mandamus* was brought to recover it, and the plaintiffs show by their evidence that they did recover it in that suit. The gist of the action in that case was the breach of duty in not entering the credit, and it was assigned by the plaintiffs as their cause of action. The cause of action in the present case is the same; and the breach here assigned, as well as in the former case, is the refusal of the defendant to enter this credit. The evidence to prove the plaintiffs' cause of action is also identical in both actions. Indeed, the record of the proceedings in the *mandamus* is the testimony relied on to show the refusal of the postmaster-general, and the circumstances under which he refused, and the reasons he assigned for it. But where a party has a choice of remedies for a wrong done to him, and he elects one, and proceeds to judgment, and obtains the fruits of his judgment, can he in any case, afterwards proceed in another suit for the same cause of action? It is true that in the suit by *mandamus* the plaintiffs could recover nothing beyond the amount awarded. But they knew that when they elected the remedy. If the goods of a party

[* 100] * are forcibly taken away under circumstances of violence and aggravation, he may bring trespass, and in that form of action recover not only the value of the property, but also what are called vindictive damages—that is, such damages as the jury may think proper to give to punish the wrongdoer. But if instead of an action of trespass he elects to bring trover, where he can recover only the value of the property, it never has been supposed that, after having prosecuted the suit to judgment and received the damages awarded him, he can then bring trespass upon the ground that he could not in the action of trover give evidence of the circumstance of aggravation, which entitled him to demand vindictive damages.

The same principle is involved here. The plaintiffs show that they have sued for and recovered in the *mandamus* suit the full amount of the award; and having recovered the debt, they now bring another suit upon the same cause of action, because in the former one they could not recover damages for the detention of the money. The law does not permit a party to be twice harassed for the same cause of action; nor suffer a plaintiff to proceed in one suit to recover the principal sum of money, and then support another to recover damages for the detention. This principle will be found to be fully recognized in 2 Bl. 880, 831; 5 Co. 61, Sparry's case; Com. Dig. tit. Action, K. 3. And in the case of *Moses v. Macferlan*, 2 Burr. 1010, Ld. Mansfield held that the plaintiff having a right to bring an action of *assumpsit* for money had and received to his use on a special action on the case on an agreement, and having made his election by bringing *assumpsit*, a recovery in that action would bar one on the agreement, although in the latter he could not only recover the money claimed in the action of *assumpsit*, but also the costs and expenses he had been put to. The case before us falls directly within the rule stated by Ld. Mansfield.

This objection applies with still more force, when as in this instance, the party has proceeded by *mandamus*. The remedy in that form originally, was not regarded as an action by the party, but as a prerogative writ commanding the execution of an act, where otherwise justice would be obstructed; and issuing only in cases relating to the public and the government; and it was never issued when the party had any other remedy. It is now regarded as an action by the party on whose relation it is granted, but subject still to this restriction, that it cannot be granted to a party where the law affords him any other adequate means of redress. Whenever, therefore, a *mandamus* is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring another action for the very same cause after he has obtained ~~the~~

benefit of the *mandamus*, would not only be harassing the defendant with two suits for the same thing, but would be inconsistent with the grounds upon which he asked for the *mandamus*, and inconsistent also with the decision of the court which awarded it. If he had *another remedy, which was incomplete and inadequate, [*101] he abandoned it by applying for and obtaining the *mandamus*. It is treated both by him and the court as no remedy. Such was obviously the meaning of the supreme court in the opinion delivered in the former suit between these parties, where they speak of the action on the case, and give him the *mandamus*, because the other form of action was inadequate to redress the injury, and they would not therefore require the plaintiffs to pursue it. And they speak of the action on the case as an alternative remedy; not as accumulative and in addition to the *mandamus*. In the case in 9 Clark & Finnelly, 251, hereinbefore mentioned upon another point, the attorney-general in his argument said that no other action would lie in any case where the party was entitled to a *mandamus*. And *Ld. Campbell*, in giving his judgment, said that this proposition was not universally true; and at any rate applied only to the original grant of the *mandamus*, and not to the remedy for disobeying it; and that no case had been cited to show that an action would not lie for disobedience to the judgment of the court. This remark upon the proposition stated by the attorney-general shows clearly that in his judgment you could not resort to a *mandamus* and to an action on the case also for the same thing. If the postmaster-general had refused to obey the *mandamus*, then indeed an action on the case might have been maintained against him. But the present suit is not brought on that ground. No question is presented here as to the necessity of pleading a former recovery in bar, nor as to the right to offer it in evidence upon the general issue. The point in the circuit court did not arise upon the pleading of the defendant, nor upon evidence offered by him; but upon the case made by the plaintiffs, in which by the same evidence that proved their original cause of action, they also proved that they had already sued the defendant upon it, and recovered a judgment, which had been satisfied before this suit was brought. And we think upon such evidence the instruction first above mentioned ought to have been given on this (the fifth) count, as it appeared by the plaintiffs' own showing that they had already recovered satisfaction for the injury complained of in their declaration.

The case before us is altogether unlike the cases referred to in the argument, where after a party has been admitted or restored to an office, he has maintained an action of *assumpsit* or case to recover

the emoluments which had been received by another, or of which he had been deprived during the time of his exclusion. In those cases the cause of action in the *mandamus* was the exclusion from office; and the suit afterwards brought was to recover the emoluments and profits to which his admission or restoration to office showed him to have been legally entitled. The action of *assumpsit* or case would not have restored him to the office, nor have secured his right to the profits. But in the case before the court, if this action had been resorted to in the first instance, instead of the *mandamus*, [* 102] the plaintiffs * could have recovered the amount due on the award, and the damages arising from its unlawful detention must have been assessed and recovered in the same verdict. Clearly they could not have maintained one action on the case for the amount due, and then brought another to recover the damages; and this, not because both were actions on the case, but because they could not be permitted to harass the defendant with two suits for the same thing, no matter by what name the actions may be technically called, nor whether both are actions on the case, or one of them called a *mandamus*.

But if this action could have been maintained, we think that most of the evidence admitted by the circuit court to enhance the damages ought not to have been received. It consisted chiefly of discounts and interest paid by the plaintiffs before the award of the solicitor, and of expenses on journeys and tavern bills, and fees paid to counsel for prosecuting their claim before congress and the courts. It appears by the record that before this evidence was offered the court had instructed the jury, that malice on the part of the defendant was not necessary to support the action; and it appears also that the jury, which found the verdict and assessed the damages, declared that their verdict was not founded on any idea that the defendant did the acts complained of, and for which they gave the damages of \$11,000, with any intent other than a desire faithfully to perform the duties of his office of postmaster-general, and to protect the public interests committed to his charge, and that the damages were given on the ground that his acts were illegal, and that the sum given was the amount of the actual damage estimated to have resulted from his illegal acts.

We have already said that although this action is in form for a tort, yet in substance and in truth it is an action for the non-payment of money. And upon the principles upon which it was supported by the court, and decided by the jury, if there had been no proceeding by *mandamus* to bar the action, the legal measure of damages upon the fifth count would undoubtedly have been the amount due on the award, with interest upon it.

The testimony however, appears to have been offered chiefly under the first count, because the items for interest paid, and travelling and tavern expenses, for the most part, bear dates before the award, and also a portion of the fees of counsel. The evidence was certainly inadmissible under this count, since for the reasons already given, no action could be maintained upon it, if there had been no previous proceeding by *mandamus*, and consequently no damages could be recovered upon it. But independently of this consideration, and even if the action could have been sustained, there are insuperable objections to the admission of this testimony. In the first place, no special damages are laid in the declaration; and in that form of pleading no damages are recoverable, but such as the law implies to have accrued from the wrong complained of; 1 Chit. Pl.

385; and * certainly the law does not imply damages of [* 103] the description above stated. But we think the evidence was not admissible in any form of pleading. In the case of *Hathaway v. Barrow*, 1 Camp. 151, in an action on the case for a conspiracy to prevent the plaintiff from obtaining his certificate under a commission of bankruptcy, the court refused to receive evidence of extra costs incurred by the plaintiff in a petition before the chancellor. In the case of *Jenkins v. Biddulph*, 4 Bingh. 160, in an action against a sheriff for a false return, the court said they were clearly of opinion that the plaintiff was not entitled to recover the extra costs he had paid; that as between the attorneys and their clients the case might be different, because the attorney might have special instructions, which may warrant him in incurring the extra costs; but that in a case like the one before them the plaintiff could only claim such costs as the prothonotary had taxed. And in the case of *Grace v. Morgan*, 2 Bingh. N. C. 534, in an action for a vexatious and excessive distress, the plaintiff was not allowed to recover as damages the extra costs in an action of replevin which the plaintiff had brought for the goods distrained; and the case in 1 Stark. 306, in which a contrary principle had been adopted, was overruled.

These were stronger cases for extra costs than the one before us. The admission of the testimony in relation to the largest item in these charges, that is, for interest paid by the plaintiffs, amounting to more than \$9,000, is still more objectionable. For it appears from the statement in the exception that the very same account had been laid before the solicitor, and had induced him, as he states in his report to congress, to make the plaintiffs an allowance in his award for interest, amounting to \$6,893.93. And to admit this evidence again in this suit was to enable the plaintiffs to recover twice for the same thing; and after having received from the United States what

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was deemed by the referee a just compensation for this item of damage, to recover it over again from the defendant.

There are several other questions stated in the record, but it is needless to remark upon them, as the opinions already expressed dispose of the whole case. The judgment of the circuit court must be reversed.

M'LEAN, J. This case is a writ of error. The facts and merits of the case are before us only so far as they are connected with the legal points raised by the bills of exceptions. I will consider these points, and not indulge in a course of remarks which could only be proper on a motion for a new trial.

Before taking up the exceptions, I will observe that, from the finding of the jury, the defendant below was acquitted of all malice with which he stands charged in the declaration. And I will add, that there is nothing in the record inconsistent with the inference that he acted from a sense of duty, and with a desire to advance the public service.

The second, third, and fourth counts in the declaration were discontinued, so that the judgment was entered on the first and fifth counts.

The first count states, that the plaintiffs were contractors for the transportation of the mail of the United States under William T. Barry, then postmaster-general, and that for services so rendered the said postmaster-general caused credits to be entered in their accounts on the books of the department for the sum of \$122,000. The defendant below was appointed to succeed William T. Barry, in the office of postmaster-general, and that he wrongfully, &c., caused the above sum of money, which had been paid to the plaintiffs as aforesaid, to be suspended on the books of the department and to be charged as a debit against them; by reason whereof the plaintiffs were unable to obtain from the department moneys under their several contracts for the transportation of the mail, which subjected them to great losses in raising funds to enable them to carry on their contracts; that their credit was destroyed, and that they were obliged to incur great expense in obtaining payment of the above sum, &c.

The fifth count claims damages for the refusal of the postmaster-general to credit them with the amount of the award of the solicitor of the treasury, as by the act of congress he was required to do; by reason whereof they were kept out of the money for a long space of time, and were subjected to expensive litigations, &c.

The first exception, by the defendant below, that I shall consider, is as follows: "That the acts of defendant, as postmaster-general,

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in suspending the allowances mentioned in the two letters from P. S. Loughborough, as treasurer, both dated 14th May, 1835, the one addressed to Messrs. Stockton and Stokes, the other to L. W. Stockton, and above given in evidence by plaintiffs, and in continually holding the same under suspension and refusing to credit or pay the same till the rendition of the solicitor's award, above given in evidence by plaintiffs, were not such as laid him liable to the plaintiffs in the right in which they now sue, to the aforesaid action, and that upon the evidence so as aforesaid produced and given on the part of the plaintiffs, they are not entitled to maintain this action on their said first, second, and third counts, of their amended declaration."

As the second and third counts of the declaration were discontinued, no reference can be had to them in considering the legal questions in the case.

The court properly refused to give the last clause of the above instruction, on the ground that it requested them to determine the effect of the evidence. This has been so often decided by this court, that no reference to authority is deemed necessary. The other part of the exception goes to the capacity in which the plaintiffs sue as partners.

The contracts under which they sue were made in the name of Richard C. Stockton, but they were made for the benefit of the plaintiffs equally, as jointly interested with Stockton. When the contracts were about being executed, the postmaster-general was informed that all the plaintiffs were interested in them; and inquiry was made of him whether the contracts made in the name of Richard C. Stockton would enure to the benefit of all concerned. The reply was, that they would; and with that understanding the contracts were signed.

The duties under the contracts were apportioned among the parties. From this state of facts, the question arises, whether the plaintiffs having a joint interest in the contracts may not sue as partners. They made the contracts in the name of Richard C. Stockton, and can there be any doubt of their right thus to make them? In this view, the others are not sub-contractors under Stockton, but are jointly interested with him in the contracts. And if any thing has been done to render the head of the department liable to Richard C. Stockton, his associates being jointly interested with him are proper parties in the action for damages. The action is not on the written contracts, but by those interested in them for a wrong done. No subdivisions of the labor among the partners can affect this question. I can have no doubt as to the right of the plaintiffs to sustain this action, if there be a ground for any action. The circuit court

therefore, in my judgment, did not err in refusing the above instruction.

The evidence of O. B. Brown, a clerk in the department, to show the interest of the plaintiffs, is objected to, on the ground that parol evidence cannot be heard to contradict a written agreement. How this applies in the present case, it is difficult to perceive. Brown does not contradict the written contracts, but swears that the plaintiffs made them with the department in the name of Richard C. Stockton. And this evidence was admissible, on the ground that where any association of individuals bind themselves by particular name or designation, in a written contract, in an action by or against the persons thus bound, the facts may be shown by parol.

The practice which prevails in this district, of praying the court for instructions on the close of the plaintiff's evidence, is a most inconvenient one, and can answer no other purpose than to introduce confusion in the case, and perplex the jury. In this case, there were two prayers for instructions on the evidence of the plaintiffs, as regards the capacity in which they sue; and a similar instruction is again asked after the close of the defendant's evidence. These instructions are founded upon the evidence, and are substantially the same, though expressed in different words.

The third instruction, asked by the defendant in the court below, will be considered in connection with the second one prayed, after all the evidence had been heard.

The fourth instruction, refused by the circuit court, was, "that the evidence so as aforesaid produced and given, on the part of the plaintiffs, so far as the same is competent to sustain any count in the declaration, is not competent and sufficient to be left to the jury, as evidence of any act or acts done or omitted, or refused to be done by defendant, which legally laid him liable to the plaintiffs in this action, under such count, for the consequential damages claimed by plaintiff in such count."

This instruction goes only to the admissibility of the evidence. The question would have been more properly raised by a motion to overrule the evidence. But viewing it as an instruction, it prays the court to instruct the jury that the facts proved are not competent and sufficient; not to prove the right of the plaintiffs to recover, but to be left to the jury, "as evidence of any act or acts done or omitted, or refused to be done by defendant," &c.

No particular facts proved are alleged to be incompetent evidence, and the court, consequently, could not give the instruction, provided there was any legal evidence before the jury, which conduced to sustain the plaintiffs' right under any one of the counts in their declaration.

That the above instruction should be mistaken by any one as a demurrer to evidence, is, to me, very extraordinary.

A demurrer to evidence withdraws it from the jury, but this instruction calls upon the court to say whether "the evidence was competent to be considered by the jury." The instruction is not in form or effect like a demurrer to evidence. It was nothing more nor less than an objection to the admissibility of the evidence.

The fifth instruction prayed is, as to the capacity in which the plaintiffs sue, and which I have already considered.

I now come to the instructions prayed by the defendant below after the close of his evidence.

The first one, being substantially of the character of the fifth, above stated, will not be examined.

The second instruction was, "if the jury find, from the said evidence, that the defendant, as postmaster-general, acted, in the premises from a conviction that he had the lawful power and authority as such postmaster-general, to set aside the extra allowances, as claimed under the allowance of his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so; and if plaintiffs suffered no oppression, injury, or damage, from such official act of the defendant, but the inconveniences necessarily resulting from such official act, then he is not liable to plaintiffs in this action for having so set aside, suspended, and recharged such extra allowances."

The principle embodied in this instruction is this: if an executive officer do an act in good faith, and, as he believes, within his power, he is not responsible for an injury done to an individual.

It will require but little reflection to show that the proposition, to the extent here stated, is unsustainable. The principle is made to depend, not upon the character of the act or its consequences, but on the intent with which it was done. Now, there are many duties of an executive officer which are purely ministerial, and others which are discharged under prescribed limitations. It is inconsistent with the nature of our institutions, that an irresponsible power should be exercised by any public agent. Every officer, from the highest to the lowest, in our government, is amenable to the laws for an injury done to individuals. An act, which the law sanctions, cannot be considered as injurious to any one. And where a discretion may be exercised, if it be exercised in good faith, the officer is not responsible for an error of judgment. But this, of necessity, is limited to matters which come within his jurisdiction. He can claim no immunity beyond this. If he could, he might act without any other restraint than his own discretion; and this would be to exercise an unmitigated and irresponsible despotism.

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If a member of this court should imprison a citizen, for causes over which the law gave him no jurisdiction, he would be responsible for damages in an action at law. And it is supposed that no higher immunity can be claimed by an executive officer. It is a fundamental principle in our government, that no individual, whether in office or out of office, is above the law. In this our safety consists.

Of all the powers exercised by the departments of this government, those of the executive are the most extensive and the most summary. They have not the forms and the deliberations of a judicial procedure. Hence it is of the utmost importance that the executive power should be defined and guarded by law. From the nature of these duties, an enlarged discretion is indispensable; and with the exercise of this discretion no other power can interpose, and no legal responsibility results from its rightful exercise. But this is not an unlimited discretion. If its boundaries be not specifically defined by statutory enactments, yet they are found in the thing done, and in the well-established principles of private right. The courts are often called on to exercise their discretion, but it must be a legal discretion. The same rule applies, where individual rights are involved, to every executive officer.

A postmaster-general, by the terms of every mail contract, on the happening of certain failures by the contractor, may forfeit it. But if he shall arbitrarily annul the contract, when, by the terms of it, he had no power to do so, he is unquestionably responsible to the party injured. And, in such a case, the plea that he acted in good faith and with a desire to discharge his duty, would not avail him. He is presumed to be acquainted with his duties, and the powers he may exercise. A contrary presumption would suppose him to be unqualified to discharge the duties of his office. It therefore follows, when a public officer does an act to the injury of an individual, which did not come within the exercise of his discretion, and was clearly not within the powers with which he is invested by law, he may be held legally responsible.

In the first count of the declaration, the plaintiffs charge that the defendant not only refused to pay to them the sum of \$122,000, which, under their contracts, they had earned, and which had been credited to them in their accounts; but that he caused that sum to be recharged to them, which represented them, on the books of the department, as defaulters, &c.

Now, had he power to do this? As this point has been expressly adjudged by this court, I need refer to no other authority.

In the case of the *United States v. Bank of Metropolis*, 15 Pet. 400, the court say: "The third instruction asked the court to say,

among other things, if the credits given by Mr. Barry were for extra allowances, which the postmaster-general was not legally authorized to allow, then it was the duty of the present postmaster-general to disallow such items of credit;" and to this instruction this court answer: "The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors of calculation, and in cases of rejected claims in which material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

The point here ruled is, in every respect, the point under consideration. And the decision is clear and unequivocal against the power of the postmaster-general to supervise the allowances and contracts of his predecessor. And more especially must this be the case, where the allowances have not only been made for services rendered, but credited to the party on the books of the department.

On the ground of fraud or mistake, a postmaster-general may suspend or annul the acts of his predecessor. But in such a case the ground should be set up as matter of justification. No such defence has been made in the present case.

Here is an act done by the defendant, as postmaster-general, which this court say he had no power to do. And as a consequence of that act, great injury has been done to the plaintiffs, as alleged in the declaration, shown by the evidence and sanctioned by the verdict of the jury. And here the question arises whether the act so complained of subjects the defendant to an action at law. My brethren think it does not; I have come to a different conclusion.

In stating the grounds of my opinion, I acquit the postmaster-general of all improper intention. And I not only do this, but I am willing to admit, that the circumstances under which he acted were such as to require from him great vigilance and firmness. He acted, too, under the sanction of the President, and in accordance with the opinion of the attorney-general. These precautionary measures go to explain his action, and show that whatever damages might have

been incurred by the plaintiffs and recovered by them, the defendant should be indemnified by the government. He should no more be subjected to loss in this respect than a collector of the customs who, under the instructions of the treasury department, collects an illegal duty upon goods imported, which subjects him to a judgment for damages.

But if the right of action exist, these circumstances cannot destroy it. They create a clear case of indemnity by the government, but they do not lessen nor excuse the injurious consequences to the plaintiffs.

There are three grounds on which a public officer may be held responsible to an injured party.

1. Where he refuses to do a ministerial act, over which he can exercise no discretion.

2. Where he does an act which is clearly not within his jurisdiction.

3. Where he acts wilfully, maliciously, and unjustly, in a case within his jurisdiction.

The first position is sustained by this court in the case of *Kendall v. The United States*, 12 Pet. 613. Speaking of the act required by the law, to be done by the postmaster-general, the court say: "It is a precise definite act, purely ministerial; and about which the postmaster general had no discretion whatever." And, again, in 612, they say: "The plaintiff's right to the full amount of the credit, according to the report of the solicitor, having been ascertained and fixed by law, the enforcement of that right falls properly within judicial cognizance." In page 614, they say: "It is seldom that a private action at law will afford an adequate remedy," where the damages are large. The act required to be done was, that the postmaster general should cause a credit to be entered on the books of the department in favor of the plaintiffs below, for a certain sum. "His refusal to do this subjected him to an action." This decision, then, sustains the position that a public officer is liable to an action for damages sustained for refusing or neglecting to do a mere ministerial act, over which he could exercise no discretion.

In the case of *Ferguson v. Earl of Kinnoull*, 9 Clark & Finnelly's Rep. 279, a decision in the house of lords, in 1842, the lord-chancellor said: "When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury he has so sustained." And he cites *Sutton v. Johnston*, 1 Term Rep. 493. His lordship further remarks:

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"A party had applied to a justice of the peace to take his examination under the statute of Elizabeth, the statute of hue and cry; the justice had refused to do this, and the party had in consequence sustained injury, because he was deprived of his right of bringing a suit against the hundred in consequence of that neglect. It was held, upon the principle I have stated, that he was entitled to recover damages against the justice for the neglect of his public duty; he having in consequence sustained a personal injury." *Green v. Bucklechurches*, 1 Leon. 323, c. 456. He states another case, of *Stirling v. Turner*. "Stirling was a candidate for the office of bridgemaster; the mayor refused to take a poll, in consequence of which he brought an action against him, and it was held that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the lord mayor to take the poll; that he neglected that duty; that the party in consequence sustained injury, and it was, therefore, held that the action might be maintained."

In his opinion, Lord Brougham says, page 289: "Courts of justice, that is, the superior courts, courts of general jurisdiction, are not answerable, either as bodies, or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors of judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing; it is implied in the nature of judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and, with the exception of the legislature and its branches, everybody is liable for the consequences of disobedience."

Lord Cottenham said: "I feel much satisfaction at finding that this case has been so deeply considered and so fully discussed by the noble and learned lords who have preceded me. I concur in the opinions which they have stated."

Lord Campbell said: "Where there is a ministerial act to be done by persons who, on other occasions, act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were, on any occasion, intrusted to them. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial functions, should not subject him to an action, in the same

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manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction, he has ceased to be a judge."

And the house of lords, without a dissenting voice, affirmed, on the above principles, the judgment.

2. An officer is liable where he does an act injurious to another, which is clearly not within his jurisdiction.

In the case of *Tracy et al. v. Swartwout*, 10 Pet. 95, this court say: "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done, he is not liable to exemplary damages; but he can claim no further exemption where his acts are clearly against law."

In the language of Lord Campbell, above cited, "where a judge does an act, which is clearly beyond his jurisdiction, he ceases to be a judge." And if he cease to be a judge, all the immunities connected with his official character, as relates to the act, also cease.

The treasurer of the United States, in the exercise of his discretion, withholds the salary of a judicial or other officer, on the ground that such officer has not faithfully discharged his duties. Now this is a matter about which the treasurer can exercise no discretion. He is, therefore, liable to an action. And on this principle, any and every officer may be made responsible for injuries done to another.

3. That an officer is liable where he acts wilfully, maliciously, and unjustly in a case within his jurisdiction, would seem to result from the foregoing considerations. But, as there is no pretence that this action is to be maintained on this ground, I shall not consider it further than to say, that the law is clear where the facts are established.

The third instruction prayed by the defendant, and refused by the court, is as follows: "If the jury, in addition to the facts above supposed in the last preceding form of instruction, further find, from said evidence, that the defendant, in refusing to credit plaintiffs with such parts of the solicitor's awards as he refused to credit them with

as aforesaid, acted from a conviction that the solicitor had no lawful jurisdiction or authority to audit, settle, or adjust the claims or items of claims upon which he awarded the several sums of money, constituting the sum of what defendant refused to credit them with as aforesaid, and from a conviction that it was therefore his official duty to refuse to credit them with so much of the amount awarded by the solicitor as aforesaid; and if plaintiffs suffered no oppression, injury or damage, from such refusal of the defendant, but the inconvenience necessarily resulting thereupon, then he is not liable to plaintiffs in this action for such refusal."

This instruction, as the one preceding it, rests the liability of the defendant upon the intention with which the act was done; and consequently, however injurious it might have been to the plaintiffs, if done with a *bonâ fide* intent, they are without remedy. This principle has been examined under the preceding instruction, and nothing further need here be said, than that this court, in the *mandamus* case above cited, held that the act referred to in this instruction was ministerial; that the defendant had no discretion over it, but was bound to enter the credit under the act of congress. And for not doing so, they held he was liable to an action.

The fourth instruction refused was, "that the defendant is not liable in this action for any of his said acts in the premises, if, in addition to the facts supposed in the last two preceding forms of instruction, the jury believe, from the whole evidence, that he acted in the premises with the *bonâ fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs."

The record shows no evidence of malice against the defendant below. His liability on other grounds has been already discussed.

The third and last bill of exceptions, was, "the plaintiffs, further to support the issues on their part, above joined, produced and offered evidence to prove their special expenses, losses, &c., in consequence of the defendant's acts in the premises, to wit, such expenses and losses as are set out in the papers annexed, marked A, B, C, D, (copied in pages 633-638;) and also their expenses and losses in the form of bank discounts, paid by Stockton and Stokes, on post-office acceptances, and interest paid by them on money borrowed from May 30, 1835, to November 9, 1836, amounting to \$9,749.14, a particular account whereof (being the same as the document 52, annexed to the solicitor's report above given in evidence by plaintiffs) they produced, as taken from the books of Stockton and Stokes, and proved that all the original entries in the said account were in the handwriting of one A. Matter, at that time the clerk who

kept the said books, and has since deceased; and further evidence to prove that Stockton and Stokes were in good credit up to May, 1835, when said suspensions were made by order of the defendant, and that their credit was afterwards destroyed in consequence of such suspensions." To the admission of which evidence defendant objected, but the court overruled the objection. This objection goes to the entire evidence in the case. And although a part of that evidence thus objected to should have been overruled, if specially objected to; yet as the exception extended to other evidence clearly admissible, it was properly overruled. This point has been so often decided, and is, in itself, so evident, that I shall not cite any authority. The objection, to prevail, must always be limited to that part of the evidence offered, which is incompetent.

Does the *mandamus* suit bar this action? My brethren think it does; in my opinion it does not.

There is no plea in bar, and how the proceedings by *mandamus* can constitute a bar, without being pleaded, I am at a loss to determine. It is true, those proceedings were given in evidence by the plaintiffs, to show what expense they had incurred, in prosecuting that suit, for the balance of the award, which should have been credited promptly by the postmaster-general. But how can this constitute a bar to this action?

What was the object of the *mandamus*; not to recover money, but to obtain an order from the court directing the postmaster-general to enter a credit to the plaintiffs for the balance of the award, on the books of the department. And such an order was made by the court, in pursuance of which the credit was given. The act of the 2d of July, 1836, referred the claims of the plaintiffs against the post-office department, to the solicitor of the treasury, who was authorized to make them "such allowances, therefor, as, upon a full examination of all the evidence, may seem right according to the principles of equity; and that the postmaster-general be, and he is hereby directed to credit the plaintiffs with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them, &c." The solicitor reported in favor of the plaintiffs \$161,553.89, as the amount of principal and interest due to them by the department. Of this sum \$122,101.46 were credited to the plaintiffs on the books of the department. But the postmaster-general refused to credit the balance, and for this cause the *mandamus* was brought.

Could the *mandamus* have been pleaded in bar of the present action? The objects of the two suits are entirely distinct. By the *mandamus*, a credit for the full amount of the sum awarded to the plaintiffs was sought. By the present action the plaintiffs seek to

recover damages sustained by them, in their business as contractors for the transportation of the mail, by reason of the suspension of more than \$120,000 which they had earned, and which had been allowed and credited to them by the predecessor of the defendant; but which the defendant had recharged against them. And also for the refusal to credit \$39,000 of the award, as the law required.

Notwithstanding this suspension and refusal, the plaintiffs allege that they were required rigidly to perform their contracts with the department, which they did at a great expense and sacrifice; and that in the prosecution of their rights, they were subjected to great expense in employing counsel, loss of time, &c. This is the foundation of the present action. And it is only necessary to state it to show that the *mandamus*, if pleaded, could have been no bar. The two actions are distinct in their character and objects, and also in the evidence on which they rest. Interest was allowed to the plaintiffs for the sums of money withheld from them by the department; but no allowance was made by the solicitor to the plaintiffs for the consequential damages sustained by them in the premises. The evidence acted upon by the solicitor, as stated in document 52, was before the jury, but the plaintiffs could claim no item which had been allowed by the solicitor. The sums allowed by the solicitor had been credited to the plaintiffs. Those sums, therefore, constituted no part of the present case. Still, the document was proper evidence to prove the award of the solicitor, as a part of the proceedings in the *mandamus* case. Indeed, the record in that case was properly received as evidence to show the delays and expenses to which the plaintiffs were subjected by the acts of the defendant.

It is said that in an action against the postmaster-general, the sum awarded might have been recovered, and also the damages claimed in this action, if such damages constitute a legal right of action. And from this an argument is drawn in support of the position, that the *mandamus* suit bars the present action. The force of this argument is not perceived. For if the damages as above stated could have been recovered by an action against the postmaster-general, it does not follow that the same damages were recoverable by the *mandamus*. In fact, no damages were recovered by the *mandamus* suit. It is true that that proceeding would bar an action on the award, as it procured a credit to be entered for the amount of the award. But the solicitor was not, by the act of congress, authorized to inquire, and he did not inquire into any consequential damages suffered by the plaintiffs, beyond the interest on the sums suspended. And the present action is brought for the consequential injuries sustained by the plaintiffs, under the peculiar circumstances of the case.

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From this view it must be apparent that the *mandamus* suit, if technically pleaded, could be no bar to this action. The history of judicial proceedings, it is confidently believed, affords no similar bar to this, which has been sustained. Nor does the award constitute a bar, for the reason that the arbitrator did not allow, nor was he authorized by the law to allow, a single item which is claimed in the present action. All the items allowed by the arbitrator were before the jury, as they could not be separated from the proceedings in the *mandamus* case; but all those items were shown to have been credited to the plaintiffs, and, therefore, the plaintiffs could not insist that those items should be any ground of recovery in this action. To say, therefore, that the evidence in this action, on which the verdict was rendered, is the same as that in the *mandamus* suit, is, in my judgment, wholly unsustained by the facts in the case. I think the judgment of the circuit court should be affirmed.

4 H. 181; 12 H. 284; 24 H. 66.

EX PARTE DORR.

3 H. 103.

No court of the United States can issue a writ of *habeas corpus* to bring up a prisoner confined by state process, for any other purpose save to examine him as a witness.

A writ of error cannot be allowed on the application of the friends of a party, without authority from himself.

[*104] * TREADWELL moved for a writ of *habeas corpus* to bring up Thomas W. Dorr, of Rhode Island.

M'LEAN, J., delivered the opinion of the court.

Thomas W. Dorr was convicted before the supreme court of Rhode Island, at March term, 1844, of treason against the State of Rhode Island, and sentenced to the state's prison for life. And it appears from the affidavits of Francis C. Treadwell, a counsellor at law of this court, and others, that personal access to Dorr, in his confinement, to ascertain whether he desires a writ of error to remove the record of his conviction to this court, has been refused. On this ground the above application has been made.

Have the court power to issue a writ of *habeas corpus* in this case? This is a preliminary question, and must be first considered.

The original jurisdiction of this court is limited by the constitution to cases affecting ambassadors, other public ministers, and consuls, and where a State is a party. Its appellate jurisdiction is regulated by acts of congress. Under the common law, it can exercise no jurisdiction.

Ex parte Dorr.

As this case cannot be brought under the head of original jurisdiction ; if sustainable, it must be under the appellate power.

The 14th section of the Judiciary Act of 1789,¹ provides : " That the courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as *judges of the district courts, shall have power [*105] to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. Provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In the trial of Dorr, it was insisted that the law of the State under which he was prosecuted, was repugnant to the constitution of the United States. And on this ground a writ of error is desired, under the 25th section of the Judiciary Act above named. That as the prayer for this writ can only be made by Dorr or by some one under his authority, and as access to him in prison is denied, it is insisted that the writ to bring him before the court is the only means through which this court can exercise jurisdiction in his case by a writ of error. Even if this were admitted, yet the question recurs, whether this court has power to issue the writ to bring him before it. That it has no such power under the common law is clear. And it is equally clear that the power nowhere exists, unless it be found in the 14th section above cited.

The power given to the courts, in this section, to issue writs of *scire facias*, *habeas corpus*, &c., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is "in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify." This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section, is indisputable.

Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other

¹ 1 Stat. at Large, 81.

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purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a circuit court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a State.

Dorr is in confinement under the sentence of the supreme court of Rhode Island, consequently this court has no power to issue a *habeas corpus* to bring him before it. His presence here is not required as a witness, but to signify to the court whether he desires a writ of error to bring before this tribunal the record of his conviction.

The counsel in this application prays for a writ of error, but as it appears from his own admission that he does not act under [*106] the *authority of Dorr, but at the request of his friends, the prayer cannot be granted. In this view it is unnecessary to decide whether the counsel has stated a case, which, with the authority of his client, entitles him to a writ of error.

The motion for a *habeas corpus* is overruled.

3 H. 292; 5 H. 176; 14 H. 108, 20 H. 588.

EDWARD CURTIS, Plaintiff in Error, v. WILLIAM MARTIN and CHARLES A. COE, Defendants.

3 H. 106.

A duty on "cotton bagging" can be levied only on articles known as such in commerce, when the act imposing the duty was passed.

THE case is stated in the opinion of the court.

Lord, for the defendant.

No counsel *contra*.

[*108] *TANEY, C. J., delivered the opinion of the court.

This case comes before the court upon a writ of error directed to the circuit court for the southern district of New York. The action was brought by the defendants in error against the plaintiff, who was the collector of the port of New York, to recover back \$4,500, which had been paid, under protest, as duties upon certain goods imported into the port of New York, in April, 1841. The goods in question were gunny cloths, and were charged by the collector as cotton bagging.

The defendants in error offered evidence to show that, in 1832,¹

¹ 4 Stats. at Large, 583.

Curtis v. Martin. 3 H.

when the law passed imposing the duty on cotton bagging, the article in question was not used or known as cotton bagging; that it was then only seen in the form of bags for India goods; that the first importation of gunny cloth, to be used as cotton bagging, was in 1834. It is made from the yute grass.

The plaintiff in error proved that these goods, at the time of the importation, were known in commerce as cotton [*109 bagging; that they were made of the proper width for that purpose, and for several years before this importation, gunny cloths had been imported and used for cotton bagging; and that the goods in question were imported from Dundee, in Scotland.

Upon this evidence, the counsel for the defendant contended that if the jury found that the article gunny cloth was, in commercial understanding, known as cotton bagging at the time of its importation, it was subject to a duty; and that the term cotton bagging, according to the commercial understanding of the phrase, signified any fabric, without regard to the material of which it was made, that was used to bale or cover cotton, and prayed the court so to charge the jury.

His honor the judge refused so to charge the jury; but, on the contrary thereof, charged that the point upon which this case turns is for the decision of the jury, namely: whether the article in question in this case was known as cotton bagging in the year 1832, when the Tariff Act was passed. It has long been a settled rule of construction of revenue laws, imposing duties on articles of a specified denomination, to construe the article according to the designation of such article, as understood and known in commerce, and not with reference to the materials of which they may be made, or the use to which they might be applied. Nor ought such laws to be construed as embracing all articles which might subsequently be applied to the same use and purpose as the specific article. If it had been the intention of congress to impose the duty upon all articles used for bagging cotton, the language of the act would have been different, and in terms prospective, adapted to such purpose. It has been argued, on the part of the United States, that the duty was intended to be laid on all articles used for bagging cotton, because the duty is laid on cotton bagging "without regard to weight or measure." These terms, "weight or measure," were intended to apply to different materials then in use for bagging cotton, such as hemp, flax, and sometimes cotton cloth, &c., and not to any new articles that might thereafter be applied to that use. So that the whole question of fact for the jury is whether gunny cloth was, in commercial understanding, known as cotton bagging when the law was passed laying

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the duty, in 1832? If it was not, they will find for the plaintiffs; if it was, they will find for the defendant.

To this charge, in every respect, the defendant's counsel excepted.

The jury found a verdict for the plaintiffs for \$4,543.17, and six cents costs.

The question brought up by this exception cannot now be considered as an open one. In the case of *The United States v. 200 Chests of Tea*, 9 Wheat. 438, the court decided that in imposing duties congress must be understood as describing the article upon which the duty is imposed according to the commercial understanding of the terms used in the law, in our own markets. This doctrine [* 110] was reaffirmed in the case of *The United States v. 112 Casks of Sugar*, 8 Pet. 277, and again in 10 Pet. 151, in the case of *Elliot v. Swartwout*. It follows that the duty upon cotton bagging must be considered as imposed upon those articles only which were known and understood as such in commerce in the year 1832, when the law was passed imposing the duty.

In the case before us, the circuit court followed the rule of construction above stated, and it has been followed also in every circuit where the question has arisen. The judgment is therefore affirmed.

4 H. 327; 7 H. 785.

SAMUEL SWARTWOUT, Plaintiff in Error, v. JOHN GIHON *et al.*

3 H. 110.

A verbal protest against the illegal exaction of duties is sufficient.¹

THE case is stated in the opinion of the court.

TANEY, C. J., delivered the opinion of the court.

This case comes before the court upon a writ of error directed to the circuit court for the southern district of New York. The action was brought by the defendants in error against the plaintiff to recover back certain sums of money paid to him as duties on brown linens, imported into New York in 1836, of which port he was at that time the collector. Some of these duties were paid under protest in writing, and some without any written protest or notice, but evidence was offered for the purpose of showing that the defendants in error verbally notified the collector that the duties charged on all of these

¹ *Contrd*, the act of February 26, 1845, (5 Stats. at Large, 727.)

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goods would be contested. The goods in question were unbleached linens, and had been charged with duty as coloured; and the jury found a verdict against the collector for the amount claimed.

At the trial, the court instructed the jury that a written notice of the objections to pay the duties was not necessary, and that it was sufficient if a verbal notice was brought home to the collector; but that the jury must be satisfied that such notice was brought home to him. To this direction the plaintiff in error excepted; and it is upon this point only that the case comes before this court.

The only object of the notice was to warn the collector that the party meant to hold him personally responsible for the money, whether he paid it over or not. It was a question for the jury to decide whether notice was or was not given; and it could make no difference, for the purposes for which it was required, whether it was written or verbal. We think the charge of the court was clearly right, and the judgment is therefore affirmed.

4 H. 327.

LESSEE OF HENRY WALLER, Assignee of the Bankrupt Estate of FRANCIS A. SAVAGE, Plaintiff, v. JAMES and JOSEPH BEST.

3 H. 111.

In Kentucky, the delivery of a *fi. fa.* to the sheriff, creates a lien on the debtor's lands, which is as valid before as after a levy.

THE case is stated in the opinion of the court.

Morehead and *B. Monroe*, for the plaintiff.

R. French, contra.

*TANEY, C. J., delivered the opinion of the court. [*118]

This case comes before the court upon a certificate of division between the judges of the circuit court of the United States for the district of Kentucky, upon the following statement:—

“Savage had the title to the land; the plaintiff claimed under the decree of his bankruptcy; the defendant, under a sheriff's sale under an execution.

“The act of bankruptcy of Savage was committed on the 27th April, 1842; the petition of his creditors was filed against him in the district court on the 25th day of June, 1842, and he was declared a bankrupt on the 26th October, 1842; the plaintiff was appointed the assignee, and this is his title.

“An execution of *fieri facias* on a judgment against the estate of

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Savage was delivered to the sheriff on the 9th April, 1842, before the act of bankruptcy, and was levied on the land on the day of before the petition; but after the act of bankruptcy the defendant purchased at the sheriff's sale, had his deed, and this was his title.

"The question was, has the plaintiff, by the decree of bankruptcy, and its relation back to the act of bankruptcy, the elder and better title; or has the defendant, by the prior delivery of the execution into the hands of the sheriff, and his levy of it, before the petition was filed, the prior and superior title?"

The statute of Kentucky, upon this subject, provides "that no writ of *fiери facias*, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff, or other proper officer, to be executed." According to the laws of that State, a judgment is not a lien upon land, and the real as well as personal estate is not bound until the process of execution against the property of the defendant is delivered to the officer. The question to be determined is, whether the delivery of the *fiери facias* to the sheriff to be executed, created a lien on the property of the defendant, for the amount for which the [* 119] execution was * issued? If it did, the title of the defendant is the superior and better title, and protected by the last proviso in the 2d section of the act to establish a uniform system of bankruptcy throughout the United States.¹

In construing the statute above mentioned, the decisions of the courts of Kentucky have not been entirely uniform. In the case of *Tabb v. Harris*, 4 Bibb, 29, decided in 1816, it was held that the delivery to the sheriff created no lien on the property of the defendant. In a subsequent case, however, in the same volume, *Daniel v. Cochrane's Administrator*, 4 Bibb, 532, decided in 1817, the court, in delivering their opinion, speak of the lien of a *fiери facias*, from the time it was delivered to the sheriff to be executed, as if it were a known and settled principle of law in that State. But this was not the main point in that case, which turned upon the question, whether the execution continued to bind the property of the debtor until the judgment was satisfied. The court held that it did not, and that the lien ceased after the return day of the execution, if it was not levied before. The question as to the lien acquired by the delivery to the officer, again arose in the case of *Kilby v. Haggin*, 3 J. J. Marshall, 208; and in this case, which was decided in 1830, the doctrine in the case of *Tabb v. Harris* was fully sustained; and it was directly and

¹ 5 Stats. at Large, 442.

distinctly decided that the delivery to the sheriff created no lien against any other creditor, and that an execution afterwards placed in the hands of the sheriff, if first levied upon the property, was entitled to a preference.

But in the case of *Million v. Ryley*, 1 Dana, 360, decided in 1833, the court held that the plaintiff obtained a lien by the delivery to the sheriff, and that the title acquired by the purchaser, when the execution was regularly levied and the property sold, related back to the delivery to the officer, and they speak of this lien as secured to the creditor by the Kentucky statute. In 1837, this subject again came before the court, in the case of *Addison and others v. Crow and others*, 5 Dana, 274, and in this case the question appears to have been very fully considered, and the case of *Million v. Ryley* was referred to and commented on, and the principle decided in it in relation to the lien of an execution reaffirmed. In this case the court say: "The levy of a *fiery facias* upon the land of the debtor undoubtedly renders the lien more specific, and being a necessary step in the execution of a writ, completes the authority of the officer to sell, and has the further effect of giving continuance both to the authority and the lien, which would otherwise expire with the return of the writ. And we do not perceive any necessity or reasonable ground for ascribing to it any other efficacy than this;" and in page 277 of the same case, the court again say: "No reason appears for attributing to a levy any efficacy, except as one step towards the consummation of the lien arising from the delivery of the execution to the officer."

* This is the latest decision in the courts of the State to [* 120] which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the State that the creditor obtains a lien upon the property of his debtor by the delivery of the *fiery facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed.

In this view of the subject, it is unnecessary to examine or to remark upon the cases which have been decided in other States, or in England, because the question depends altogether upon the law of Kentucky. And, as by the laws of that State, a *fiery facias*, when delivered to the sheriff, is a lien upon the property of the debtor while it continues in the hands of the officer to be executed, the creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is

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in the hands of the sheriff. In the case before us, therefore, the court are of opinion that the defendant, by the prior delivery of the execution, and the subsequent levy and sale, has the prior and superior title, and we shall certify accordingly to the circuit court.

3 H. 426 ; 7 H. 612.

THE UNITED STATES, Plaintiff, v. HEZEKIAH H. GEAR, Defendant.
THE UNITED STATES, Complainant, v. HEZEKIAH H. GEAR, Defendant.

3 H. 120.

In the districts made by the act of June 26, 1834, (4 Stats. at Large, 686,) lead-mine lands were not subjected to sale, nor liable to be located on by preëmption rights.

Digging lead ore from the public lands is such waste as entitles the United States to an injunction.

CERTIFICATE of division of opinion by the judges of the circuit court of the United States for the district of Illinois, in these two cases, one of which was an action at law, and the other a suit in equity, to try the title to a lead mine.

The questions certified in the equity cause were as follows : —

1. Whether the act of congress, entitled “ An act to create additional land districts in the States of Illinois, Missouri, and the territory north of the State of Illinois,” approved June 26, 1834, so far repeals the 5th section of the act of the 3d of March, 1807,¹ entitled “ An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes,” as to subject the lands mentioned in said act of June 26, 1834, containing lead mines, to be entered and purchased by preëmption under any of the preëmption laws of congress ?

2. Whether the said act (1834) requires the President of the United States to cause lands containing lead mines to be sold, or only authorizes him to do so in his discretion ?

3. Whether lands containing lead mines are subject to be held or purchased under any of the acts of congress granting the rights of preëmption to settlers upon the public lands ?

4. Whether the digging lead ore from the lead mines upon the public lands of the United States, is such a waste as entitles the United States to the allowance of a writ of injunction to restrain ?

The questions certified in the action at law, were as follows : —

1. Does the act of congress, entitled “ An act to create additional land districts in the States of Illinois and Missouri, and in the terri-

¹ 2 Stats. at Large, 449.

tory north of the State of Illinois," approved June 26, 1834, require the President of the United States to cause to be offered for sale the public lands situate in the land district created by said act, containing lead mines?

2. Does the said act require the President to cause said lands containing lead mines, to be sold, notwithstanding the 5th section of the act of the 3d of March, 1807, entitled "An act making provisions for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes?"

3. Are the said lands, containing lead mines, subject to preëmption under any of the preëmption laws which have been passed by congress?

4. Does the 4th section of the said act of 1834 so far repeal the 5th section of the act of 1807, as to subject the public lands containing lead mines, to be sold by the United States in the same manner as other public lands not containing lead mines?

5. Are the said lands, containing lead mines, subject to preëmption or sale under any of the existing laws of congress?

The acts of congress referred to in the opinion of the court, are:—

March 3, 1807, § 5, (2 Stats. at Large, 449.) This section relates to lead mines in the Indiana territory, which then included what is now the State of Illinois. May 29, 1830, §§ 1, 4, (4 Stats. at Large, 420;) April 5, 1832, (4 Stats. at Large, 503;) July 14, 1832, (4 Stats. at Large, 603;) March 2, 1833, (4 Stats. at Large, 663;) June 19, 1834, § 1, (4 Stats. at Large, 678;) June 26, 1834, § 4, (4 Stats. at Large, 687;) June 22, 1838, (5 Stats. at Large, 251;) June 1, 1840, (5 Stats. at Large, 382;) September 4, 1841, § 10, (5 Stats. at Large, 453.)

Nelson, (attorney-general,) for the United States.

Hardin, contra.

* WAYNE, J. delivered the opinion of the court. [*129]

From the foregoing statement of all the acts of congress having any bearing on the subject before us, we think it obvious it was not intended to subject lead-mine lands in the districts made by the act of the 26th June, 1834, to sale as other public lands are sold, or to make them liable to a preëmption by settlers.

* The argument, in support of a contrary conclusion, is, [*130] that the reservations in the fourth section of that act, with the authority given to the President to sell all the lands in the districts, any law of congress, heretofore existing, to the contrary not-

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withstanding, exclude lead-mine tracts in those districts from the operation of the act of the 3d of March, 1807. At most, the language of the fourth section of the act of 1834 imparts only an authority to the President to sell, given in the same way as it has been conferred upon him in other acts providing for the sale of the public lands. Then the question occurs, whether the section of an act, in general terms to sell, (certain reservations excepted,) without any reference to a previous act, which declares that lead mines in the Indiana territory shall be reserved for the future disposal of the United States, is so far a repeal of the latter, that lead-mine lands in a part of that territory are subjected to sale as other public lands are. Why should congress, without certain words showing an intention to depart from the policy which had governed its legislation in respect to lead-mine lands in the whole of the Indiana territory, from 1807 to 1834, be supposed to have meant to exempt a portion of the lead-mine lands in that territory from that policy, in an act, the whole purview of which was to create additional land-sale districts? Besides, the reservations in the fourth section of the act of 1834, except the tract for the village of Galena, are no more than the reaffirmance of some of the provisions of other statutes respecting reservations made or to be made out of the public lands in other districts, and cannot, therefore, be considered as an enumeration in connection with the general power to sell all lands, any law of congress heretofore existing to the contrary notwithstanding, repealing another act, providing for a reservation of a particular class of lands within the same land district to which the act of 1834 applies. The reservations in the fourth section of the act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power of the President to sell lands, which, by law, he never had a power to sell — which have always been prohibited by law from being sold — and which never have been sold, except under the authority of a special statute, such as that of the 3d March, 1829,¹ 1 Land Laws, 457, which authorized the President to cause the reserved lead mines in the State of Missouri to be sold. In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead-mine lands, or to come to the conclusion that the reservations of them can only be released by special legislation upon the subject-matter of such reservations. Authority, then, to sell all lands in the districts made by the act of 1834, though coupled with the concluding words of the fourth section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale by force of law. The propriety of this interpretation of that section is

¹ 4 Stats. at Large, 364.

more manifest when it is considered if a contrary *interpre- [*131]
tation is given, that the lead-mine lands in one district of
the same territory would be liable to sale and preëmption, and those
in another part of it would not be. Can any one possible reason be
suggested to sustain even the slightest intention upon the part of
congress, when it was passing the act of 1834, to make such differ-
ences in respect to lands within the same locality, as have just been
mentioned? Could congress have meant to say, under a power to
sell, that it would be lawful to sell in the new land district what it
was unlawful to sell in other land districts of the same territory of
which the new land district was also a part? And that settlers upon
the public lands within the new district, should have a right of pre-
emption in lead-mine tracts, which settlers upon other lands within
the same territory, but not within the new land district, could not
have? The mere fact of a new land district having been made out
of a part of the territory in which the lead-mine lands had been re-
served, with the authority to the President to sell all lands in the new
district, can have no effect to lessen the force of the original reserva-
tion. In truth, the acts of 1834 and 1807 do not present a case of
conflict in the sense in which statutes do, when, from some expression
in a later act, it may seem that something was intended to be excepted
from the force of the former, or to operate as a partial repeal of it.
The rule is, that a perpetual statute, (which all statutes are unless
limited to a particular time,) until repealed by an act professing to
repeal it, or by a clause or section of another act directly bearing in
terms upon the particular matter of the first act, notwithstanding an
implication to the contrary may be raised by a general law which
embraces the subject-matter, is considered still to be the law in force
as to the particulars of the subject-matter legislated upon. Thus, in
this case, all lands within the district mean lands in which there are,
and in which there are not, minerals or lead mines; but a power to
sell all lands, given in a law subsequent to another law expressly
reserving lead-mine lands from sale, cannot be said to be a power to
sell the reserved lands, when they are not named, or to repeal the
reservation. In this case, there are two acts before us, in no way
connected, except in both being parts of the public land system.
Both can be acted upon without any interference of the provisions of
the last with those of the first—each performing its distinct func-
tions within the sphere, as congress designed they should do. But
further, that the act of 1834 was not intended as a repeal of the act
of 1807, in regard to lead mines, so as to grant a right of preëmption
in them to settlers, is manifest from the fact that an act was passed
only seven days before it, reviving an act to grant preëmption rights

to settlers on the public lands, which excludes settlers from the right of preëmption in any land reserved from sale by act of congress. Thus reasserting then what had been uniformly a part of every preëmption law before, and what has been a limitation upon [* 132] the right of preëmption in every act for * that purpose since.

We do not think it necessary to pursue the subject further, except to say that the view we have here taken of the act of 1834, in respect to lands containing lead mines, and the right of preëmption in them, is coincident with the opinion given by this court in the case of *Wilcox v. Jackson*, 13 Pet. 513. That case was well and most carefully considered, and expressed in the deliberate language of this court. We determined, then, the point being directly in the cause, that the act of 1834 had relation to a sale of lands in the manner prescribed by law, at public auction, and that a right of preëmption was governed by other laws. The court said: "The very act of 19th June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, (meaning the act of 26th June, 1834,) thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated." We see no reason to change what was then the view of the court. On the contrary, there is much in this case to confirm it. Let it be certified, therefore, to the judges of the circuit court of the United States for the district of Illinois, that this court is of the opinion that the act of congress, entitled "An act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act. 2. That the said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the 3d March, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

To the third question, we reply that the lands containing lead mines in the Indiana territory, or in that part of it made into new land districts by the act of the 26th June, 1834, are not subject, under any of the preëmption laws which have been passed by congress, to a preëmption by settlers upon the public lands.

To the 4th question, we reply that the 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d of March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which

grants for lead-mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might be, discovered in the Indiana territory, for a term not exceeding five years.

To the fifth question, we reply that the land containing lead mines in the districts made by the act of 1834, are not subject to preëmption and sale under any of the existing laws of congress.

*The foregoing answers apply also to the points upon [*133] which the judges were divided in opinion upon the bill in chancery, between the United States and the defendant, Gear, except the fourth question certified in that case; and to that we reply, that digging lead ore from the lead mines upon the public lands in the United States, is such a waste as entitles the United States to a writ of injunction to restrain it.

M'LEAN, J. I dissent from the opinion of the court.

The question certified, in my judgment, should be answered in the affirmative.

That it was the intention of congress to sell, at public sale, the land in question, is clear, if that intention is to be ascertained by their own language. In the 4th section of the act of 26th of June, 1834, it is provided: "That the President shall be authorized, as soon as the surveys shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land-offices in the respective districts in which the land so offered is embraced, reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of congress heretofore existing to the contrary notwithstanding."

The land lies in one of the land districts above referred to, and is not within any one of the reservations named in the section. This being admitted, is there any ground to doubt that congress authorized the President to sell all lands covered by the section and not reserved in it. They have said so expressly. The language of the section is so clear as to admit of no other construction. And it would seem to me that such must be our judgment, unless we can judicially say, that when congress speak in the authoritative language of law, they do not mean what they say. Such a decision would constitute a new rule for the construction of statutes.

It is said that the land occupied by the defendant was reserved by

the 5th section of the act of the 3d of March, 1807. This is admitted. But the question is, whether it was reserved by the act of 1834? The 5th section above referred to provides: "That the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null." Now the tract in question had on it a lead mine, and, being then within the Indiana territory, of course, came within the reservation just cited. But such reservation was made only "for the future disposal of the United States." And the act of 1834 does authorize the President to dispose of this and all other tracts in the districts named not specially reserved in that act. This latter act then, by consequence, repeals the act of 1807. In this respect the acts are repugnant. They cannot stand together. The first act reserves the land for the future disposal of the United States, and the last act disposes of it. The President is, undoubtedly, bound, within a reasonable time after the surveys were executed, to issue his proclamation offering for sale, at public auction, the lands in the above districts. And after such sales all the lands not sold or reserved were open for entry as the law provides. A failure of the President to execute a duty enjoined by law cannot affect any individual right involved in this case.

It is not doubted that if no other consequence resulted from the above construction of the act of 1834, than the mere authority of the President to sell the land, there would have been little or no diversity of opinion on the subject; but a preëmptive right in the defendant may follow such a construction, and this creates the difficulty in the case. But when the law is clear we should follow it, without regard to consequences.

In my judgment the preëmptive right of the defendant, if he shall bring himself within the law, is as clear as that the President was authorized to sell the land.

By the 1st section of the act of 29th May, 1830, it is provided: "That every settler or occupant of the public lands prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby authorized to enter, with the register of the land-office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum

price of said land: Provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States," &c.

By the act of the 19th of June, 1834, every settler prior to the passage of that act, then in possession, and who cultivated any part of the land in 1833, was declared to be entitled to the benefit of the act of 1830, which act was continued in force two years. And by the act of the 22d of June, 1838, it is provided, that every actual settler of the public lands being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of the above act of the 29th May, 1830. And that act was declared to be in force two years. In the same section, it was declared that said right should not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

As the Preëmption Act of the 19th of June, 1834, passed seven days before the act which authorized the President to sell the land in question, and as, prior to this latter act, the land was reserved from sale by the acts of 1807 and 1830, the preëmption right may not have attached to the residence of the defendant. But if this be admitted, the act of 1807 having been repealed, as above shown, by the 4th section of the act of the 26th of June, 1834, there seems to me to be no doubt, that the preëmption right did attach under the law of 1838. After the land was authorized to be sold, it could no longer be considered as reserved from sale by the act of 1807; and the act of 1838 only excepted from the right of preëmption such tracts as were at that time reserved by the authority of the United States. In this view, then, it would seem the right of preëmption is in the defendant, if he were a resident on the land within the provisions of the act of 1838.

It is said the law authorizing the sale of these lands and the preemption laws, being all on the same subject, must be taken together, and so construed as to effectuate the intention of congress. This is admitted. But does this rule of construction authorize the court to say, that where a subsequent law is repugnant to a prior one, they may both stand. It is impossible to give effect to both, as they are inconsistent. The truth of this is forcibly illustrated by the acts in question. By the 4th section of the act of 1807, the lead mines are reserved for the future disposal of the United States. By the 4th section of the act of 1834, these with all other lands, not specially reserved in that section, are authorized to be sold. It is true the

lead mines are not named in the section as authorized to be sold, but they are not reserved from sale by it, and the authority to sell all other lands not reserved in the section necessarily includes them. Now how are these two laws to stand together. The one reserves the lands for the future disposal of congress, and the other disposes of them. Can effect be given to both of these laws? Can we say that this repugnancy does not necessarily repeal the act of 1807? A negative answer to this inquiry would add, as I think, a new principle to the construction of statutes. Instead of following the rule on this subject which is obvious, sensible, and just, we should involve ourselves in the mysteries and uncertainties of the alchemist.

It is said congress did not intend to dispose of the lead mines and the lands adjacent thereto by the act in question. To this I answer, that I have no other mode of ascertaining the intention of congress except by the plain and unequivocal language which they have used in the solemn form of law. Whether the lead mines were valuable or not, is not a matter of any importance in regard to a right construction of the act. We cannot go out of the law to ascertain what is meant by it. If it were proper to investigate the policy of reserving lead mines, salt springs, and mill seats, for the benefit of the United States, it would not be difficult to show that they had not been a source of revenue to the United States. In most instances, it is believed, if not in all, the expenses of superintendencies have absorbed the profits.

The case of *Brown and Wife v. Clements et al.*, decided at the present term, 3 How. 650, has a strong bearing upon the principles involved in this case.

It is contended that the main point in this case was decided in *Wilcox v. Jackson*, 13 Pet. 509. In my judgment, that decision has no bearing on the present question. Beaubean in that case set up a preëmption right to the tract of land in controversy, having obtained from the register and receiver of the proper land-office a certificate sanctioning his right. But the government showed that the land had been reserved for a military post in 1804, and was occupied as such until, in 1812, during the late war, the fort was taken by the enemy and the troops were massacred. It was reoccupied in 1816, and from that time the government continued to occupy it for a military post, as a trading establishment with the Indians, and also for a light-house, which had been built upon the ground at an expenditure of \$5,000. This possession was continued by the government up to the time the preëmption was claimed. But in addition to these facts, the 4th section of the act

of 1834 specially reserved from sale such places "as the President shall deem necessary for military posts." So that here was not only an express reservation of the land from sale, in the above section, but a reservation in fact was shown of more than thirty years, and a continued possession by the government.

Now, is there any similarity, as to the legal points, in the two cases? I can see none. It is true that Mr. Justice Barbour says: "We do not consider this law, (the act of 26th of June, 1834,) as applying at all to the case. That has relation to a sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right of preëmption, and governed by different laws. The very act of the 19th of June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated. But we go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

But one of the points above stated was necessary to a decision of the case. The tract in question was reserved for a military post; and such reserves, by the 4th section of the act of 26th of June, 1834, were excepted from the lands to be sold. Now, the reservation was fully proved by the evidence, and that, under the above section, ended the controversy. The remark, that the above act had no application to the case, was correct in the sense only that it had no application to affect injuriously the title of the government, and that, it is presumed, was the sense in which it was used by the judge. It is strictly true, as stated, that the preëmption right set up was assumed to be derived under a different law. But the statement, that the above act of 26th of June, 1834, could have no effect upon the Preëmption Act which was passed on the 19th of the same month, was not in the case, was unauthorized, and is wholly unsustainable. It was not in the case, because the 4th section of the act of the 26th did reserve the land. No court can deliberately say, that an act which is wholly repugnant to a preceding act, does not repeal it. And it can be of no importance whether the preceding act had been passed seven days or seven years before the last act; the effect is the same.

There can be no doubt, that when a tract of land is appro-

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priated for a military post, or for any other permanent object, it becomes separated from the mass of the public lands, and need not be specially reserved in the President's proclamation for the sale of lands in the same district. And the illustration of Mr. Justice Barbour shows his meaning. "Thus, in the act of 26th June, 1834," he says, "there is expressly reserved from sale the land granted to individuals and the State of Illinois." "If such lands were sold," says the judge, "could the purchasers hold them? Certainly they could not. Having been previously granted by the United States, the second grant would be void."

But what is the case now under consideration? There was no appropriation of the lead mines, of a permanent character, which separated them from the mass of the public lands. "They were reserved for the future disposal, by the United States." And, as has been shown, the act of the 26th June, 1834, authorized the President to sell them. This, then, if there be any meaning in language, was a disposal of them within the act of 1807, by which they were reserved.

There seems to be an impression that preëmption rights are without merit, and that the acts under which they arise should receive a strict construction. In my judgment, the acts granting these rights are remedial in their nature and policy, and should be so construed as to effectuate the intention of congress. It is a right arising under the statute, and must, of course, be brought within it. But the policy of the statute was a benign one, and it was founded upon a meritorious consideration. That legislation which tends to make every citizen a freeholder, cannot be unwise or impolitic.

This opinion has been submitted to Mr. Justice Story, and Mr. Justice M'Kinley, who have authorized me to say that it coincides with their own views on the subject.

11 H. 229; 16 H. 416.

SAMUEL GORDON, Plaintiff in Error, v. THE APPEAL TAX COURT.

JAMES CHESTON, Plaintiff in Error, v. THE APPEAL TAX COURT.

3 H. 133.

Where the legislature of a State accepted from banking corporations a bonus, as a consideration for the franchise granted, and pledged the faith of the State "not to impose any further tax or burden upon them, during the continuance of their charters under this act," — *Held*, that a tax upon the stockholders, by reason of their stock, was a violation of this contract, and the tax was illegal.

But the exemption lasted only during the continuance of the charters under that act; and when extended without any such promise, the power to tax revived.

ERROR to the court of appeals of the State of Maryland.

In 1841, the legislature of Maryland passed a tax law, which, among other things, directed that "all stocks or shares, owned by residents of this State, in any bank incorporated by this State," should be assessed.

It was alleged, in the first case, that this act impaired the obligation of a contract made by the State, by an act passed in 1821, which, after reciting that it is the interest of the State to have a turnpike road, which is therein described, and that certain banks are willing to make the same if their charters can be extended, incorporates a company to make the road, extends the charters of the banks upon condition of their subscribing to the necessary stock, in proportion to their respective capitals, provides that the banks shall annually pay, to the treasurer of the State, twenty cents on every hundred dollars of capital paid in; and, then, in the 11th section, the terms of which are given in the opinion of the court, makes the promise relied on by the plaintiff, Gordon. The 12th section enabled the banks to commute the annual tax by paying a round sum. It was agreed, the bank in which Gordon held stock, complied with the conditions prescribed by this act.

In the other case, the banks in which the plaintiff, Cheston, held stock, having been incorporated after the act of 1821, and also the charters of the other banks having been extended, the benefit of the contract, made by that law of 1821, was claimed by virtue of an act passed in December, 1834, * to "extend the char- [* 136]
ters of several banks in the city of Baltimore," by which, amongst other enactments, the charter of the Union Bank was extended to the end of the year 1859. It introduced some new provisions into the charter, required the payment of the school tax and a proportionate share of \$75,000; but contained no stipulation like that of the 11th section of the act of 1821.

* The court of appeals decided that the tax imposed by [* 137] the act of 1841, was not a violation of the contract between the State and the banks, which was effected under the act of 1821, and, to review this opinion, the writ of error was brought.

Meredith and Dulany, for the plaintiffs in error.

Nelson, (attorney-general,) and *Steele*, for the defendants.

* **WAYNE, J.**, delivered the opinion of the court. [* 144]

The question raised in this case by the agreed statement of facts upon the record, is: Does the act of Maryland of 1841, c. 23, so

far as it imposes a tax upon the shares of stock held by stockholders in the Union Bank of Maryland, and the other banks mentioned in the statement, impair the obligation of a contract?

The banks are classified in that statement as the old and the new banks. The old, are those which were chartered previous to the year 1821; the new, those which were chartered after the year 1830.

Their exemption from the tax imposed by the act of 1841 is claimed under the acts of Maryland of 1821, c. 131, and that of the 19th March, 1835, c. 274, called the act of the session of 1834.

[* 145] * It is admitted that the old banks accepted and have complied with the terms and conditions of the act of 1821; that they also accepted and have complied with the provisions of the act of 1834; and that taxes have always, since the incorporation of the banks, been assessed and levied upon their real and personal property in all the cities and counties of the State, in the same manner as upon property of the same kind belonging to individuals, and that they have always been paid by the banks up to this time.

The question, however, which this court is called upon to decide, and to which our decision will be confined, is, are the shareholders in the old and the new banks liable to be taxed, under the act of 1841, on account of the stock which they own in the banks?

The statement given by the reporter of the acts of the legislature of Maryland, by which the charters of the banks have been extended at different times, makes it unnecessary to refer to them in detail here.

Are the old banks in Baltimore and their stockholders exempted from further taxation during the continuance of their charters under the act of 1821, c. 131, by force of the 11th section of that act? Can the old banks, after the year 1845, the time to which their charters were extended by the act of 1821, and the new banks, claim any exemption from taxation under the act of 1834, c. 274, unless it be a tax upon their franchise of banking?

It appears, from the acts of 1812, 1813, and 1821, that the legislatures, which passed them, had in view the construction of the Cumberland and Boonsborough turnpike roads, and the establishment of a school fund. That they designed to accomplish those objects by making some of the banks construct the roads, and all of them contributors to the school fund, as the price for their charters. A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of their corporate existence, than to pay

its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the legislature intended the annual tax or charge upon the capital stocks of the banks to be the bonus or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts, by choosing to pay the annual charge instead of the stipulated alternative, it is plain that they thought so too, and that they understood in that way the contract between themselves and the State. Either was a condition, to be accepted and complied with before the charters were to be extended. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has *been bought from the State? was repeatedly asked in the [* 146] course of the argument. The reason is, that every one buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price. But whether the bonus for the franchise is paid by an annual tax upon the capital stock, or in any other way, it is in the discretion of the legislature to tax the capital stock as an aggregate, according to its actual value, or the stockholders on account of their separate ownership of it, or the dividends in the aggregate, or the stockholders on account of their portions of them. The limitation and the power to tax, as both have been just expressed, was substantially conceded by counsel on both sides of this cause. We did not understand the counsel for the appellants as contending that the shareholders in the old banks were exempted from the tax imposed upon them on account of their stock, except by the force of the 11th section of the act of 1821. Their argument was, though the franchise might be taxed separate from the stock of a bank, whether the annual tax paid by the banks upon their capital stock, was a tax upon their franchises or not, that the banks were exempted from further taxation; the old banks by force of the 11th section of the statute of 1821, and all of the banks in Baltimore by force of the act of 1834. The argument of the counsel for the defendant in error was, that the annual tax paid by the banks, was a tax upon their franchises, and that the 11th section did not give to the stockholders any exemption from being taxed as persons on account of their stock. Whether or not the exemption given by that section is extended to the old and the new

banks in virtue of the act of 1834, is another question, to which a separate answer must be given in the course of this opinion.

Has such an exemption been given to the old banks? The language of the 11th section of the act of 1821, is: "And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." This is the language of grave deliberation, pledging the faith of the State for some purpose — some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do, if the banks accepted the act, or from what they might do, in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price for the prolongation of their franchise of banking. The power of the State to lay any further tax upon the franchise, was exhausted. That

is the contract between the State and the banks. It follows, then, * as a matter of course, when the legislature goes out of the contract, proposing to pledge its faith, if the banks shall accept the act, not to impose any further tax or burden upon them, that it must have meant by those words an exemption from some other tax than a further tax upon the franchise of the banks. The latter was already provided against. To confine the pledge to any further tax upon the franchise, surrenders the whole clause as a substantive enactment, to a supposed needless declaration of the legislature, that it would not do what it had stipulated by its contract not to do. The faith of States is never pledged but for some substantial end, within the competency of their legislative power; and it is not for us to suppose that of Maryland was given in the act of 1821, with a less grave intent. "Not to impose any further tax or burden," when used in reference to some tax already imposed, means no other tax besides that to which reference is made. Those words, so used, cannot be limited by a refinement upon the etymology of the word "any," out of, or beyond its meaning in common discourse, to any like; and the words, "any further tax," used with relation to some other tax, will, by common consent, as it always has been, be intended to mean any additional tax besides that referred to, and not any further like tax.

Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption given by it, or to what does it apply? Does it

exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts, that a tax upon the parts would have upon the whole. Besides, the legislature, in proposing the terms and conditions of the act, use the word "banks" with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. The acceptance of the act could only be made by the stockholders. They did accept, and the State recognized it as the act of the stockholders. It could not have been given or been recognized in any other way. True it is, when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character, or by whose assent it was to become a contract with the State, to ascertain the intention of the legislature in making the pledge, "that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act."

The senses in which the words bank or banks are used, occur every day in conversation, and are understood by every one.

But * the sense in which they are intended to be used, is [* 148] determined by their connection with what is said besides.

When we speak of an act to be done by a bank or banks, we mean an act to be done by those who have the authority to do it. If it be an act within the franchise for banking, or the ordinary power of the bank to contract, and it is done by the president and directors, or by their agent, we say the bank did it, and every one understands what is meant. If, however, an act is to be done relative to the institution, by which its charter is to be in any way changed, the stockholders must do it, unless another mode to effect it has been provided by the charter. In one sense, but after it has been done, we may say the bank did it, but only so because what the stockholders have done became a part of the institution, which it was not before. The act to be done in this instance was relative to the institution. The legislature knew it could only be done by the stockholders, and it uses the word banks in reference to the act being accepted by the stockholders. The act was accepted by them. When, then, the legislature says, "that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this

act," the relative is as broad as the antecedent, comprehending all that the latter referred to. It cannot be said, then, that the stockholders in the old banks are not exempted by the 11th section of the act of 1821 from being taxed as persons, on account of their stock in those banks, during the continuance of their charters under that act.

Such was manifestly the intention of the legislatures which passed the acts of 1813 and 1821, from their language. It is confirmed by the attendant circumstances. Each of those legislatures were anxious to have a certain road constructed, which they thought the convenience and intercourse of the citizens of Maryland required; and they were also anxious to raise an adequate school fund for every county in the State. They determined that both should be accomplished by incorporating certain banks, with the obligation upon them to make the roads, and to make all the banks in the State pay an annual tax upon their respective capitals, for a school fund, as the conditions upon which their charters were to be extended. By the act of 1813, c. 122, every incorporated bank in the State was required to pay the annual tax of twenty cents upon every \$100 of its capital stock, as the condition upon which its charter was to be extended.

When the legislature, in 1821, incorporated the Boonsborough Turnpike Company, and proposed to extend the charters of those banks, which, by the terms of the act, were to subscribe for stock enough to complete the road, it renewed upon those banks the school tax which had been imposed upon them in common [* 149] with the other banks, by the act of 1813. The 11th sections in both acts are identical. In what spirit were those acts offered to the acceptance of the banks? In what spirit was it that the banks viewed and accepted these acts? It was an unusual way of providing means for the construction of turnpike roads. The tolls might turn out to be enough to compensate them for the expenditures. They might not. Though the legislature thought the construction of the roads and paying the school-fund tax were no more than an adequate price for an extended franchise, it is very certain that the stockholders may have thought, that the incorporation of the banks into turnpike companies, with an obligation upon them to withdraw so much money from their business operations as was sufficient to finish the roads, presented only a contingent possibility that they could be remunerated by tolls from the roads. When the act of 1821 was proposed, they had some experience of what had been the result of the construction of the Cumberland Road. It is not possible, then, that when the acts of 1813 and 1821 were in

preparation, or as they were being enacted, that the 11th section was introduced as an inducement to the stockholders to accept those acts? Whether the tolls from the road have ever compensated the banks for the expenditure upon them, does not appear in the case. But it was natural that the stockholders, knowing as they did that a tax upon the franchises of the banks would not exempt them from other taxation, stipulated in both instances that a provision should be introduced into the acts surrendering the State's right to tax them further than they were about to be by those acts. In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears from the 11th sections in those acts, to have been the intention of the legislatures which passed them, to exempt the stockholders from taxation as persons on account of the stock which they owned in the banks. This exemption, however, is limited to the old banks in Baltimore, which were chartered before 1821, during the continuance of their charter under the act of 1821. It is founded upon the 11th section of that act, and it is our opinion that the act of 1841, c. 23, in so far as it imposes a tax upon the stockholders in those banks, on account of their stock, does impair the obligations of a contract, and is void by the 10th section of the 1st article of the constitution of the United States.

The act of 1834 does not extend to the old or the new banks an exemption from the tax imposed by the act of 1841, c. 23. It is an act to extend the charters of the several banks in Baltimore. The second section prescribes the terms upon which the franchise for banking is extended. Those terms are the payment annually of twenty per cent. upon every \$100 of the respective capitals of the banks, and their proportional parts of \$75,000, in two yearly instalments, computed from the passage of the act, according to the combined rates of their respective capitals paid in, * and [* 150] of the time for which their charters are respectively continued beyond the first day of January, 1845.

Upon a failure of any bank to pay either the annual charge or its proportional instalment, its charter is declared null and void. The annual charge and the instalment make the bonus to be paid by each bank for its continued franchise. It was urged for the old and the new banks, that the annual tax which they were required to pay by the second section of the act of 1834, being upon their respective capitals, a tax upon the stockholders on account of their stock would be equivalent to an increase of the price which had been given for the franchise. The effect upon the stockholders would be the same, as they pay both, but that is because they agreed to pay an annual tax upon the capital stock, for their franchise, without any stipula-

tion by the State that they were not to be taxed as stockholders, on account of their stock, as was the case in the 11th section of the act of 1821. The franchise is their corporate property, which, like any other property, would be taxable, if a price had not been paid for it, which the legislature accepted, as the consideration for allowing them to use the franchise during the continuance of their charters. The capital stock is another property — corporately associated, for the purpose of banking — but in its parts is the individual property of the stockholders in the proportions they may own them. Being their individual property, they may be taxed for it, as they may for any other property they may own. This is not only the case in Maryland. A franchise for banking is in every State of the Union recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government.

We are of opinion that the stockholders in the old banks are exempt from the tax imposed by the act of 1841, c. 23, during the continuance of their charters under the act of 1821, but that the stockholders in the old and new banks are liable to be taxed by the act of 1841, or that they can claim no exemption under the act of 1834, by which their charters were further extended.

The judgment of the court of appeals is therefore reversed, and the cause will be remanded, with directions to enter up a judgment for the plaintiff in error.

6 H. 801; 1 B. 486; 4 Wal. 244.

WILLIAM SEARIGHT, Commissioner and Superintendent of the Cumberland Road, within the State of Pennsylvania, Plaintiff in Error,
v. **WILLIAM B. STOKES** and **LUCIAS W. STOCKTON**, who have survived **RICHARD C. STOCKTON**, Defendants in Error.

3 H. 151.

The act of the legislature of Pennsylvania, passed in 1836, imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within that State, is in conflict with the compact between that State and the United States arising from the act of congress of March 3, 1835, (4 Stats. at Large, 772,) under which the State took possession of the road.

ERROR to the circuit court of the United States for the eastern district of Pennsylvania. The case is stated in the opinion of the court.

Beach and Walker, for the plaintiffs.

Coxe and Nelson, (attorney-general,) *contra*.

Searight v. Stokes. 3 H.

* TANEY, C. J., delivered the opinion of the court. [*162]

The question in this case is, whether the State of Pennsylvania can lawfully impose a toll on carriages employed in transporting the mail of the United States over that part of the Cumberland road which passes through the territory of that State?

* The dispute has arisen from an act of the legislature of [*163] Pennsylvania, passed in 1836, whereby wagons, carriages, stages, and other modes of conveyance, carrying the United States mail, with passengers or the goods of other persons, are charged with half the toll levied upon other vehicles of the like description. The plaintiff in error is the commissioner and superintendent of the road, appointed by the State. The defendants are contractors for carrying the mail, and they insist that their carriages, when engaged in this service, are entitled to pass along the road free from toll, although they are conveying passengers and their baggage at the same time. In order to obtain the opinion of this court upon the subject, an amicable action was instituted by the plaintiff in the circuit court of the United States for the western district of Pennsylvania, for the tolls directed to be collected by the law above mentioned, and the facts in the case stated by consent. The judgment of the circuit court was against the plaintiff, and it is now brought here for revision by writ of error.

The Cumberland road has been so often the subject of public discussion, and the circumstances under which it was constructed and afterwards surrendered to the several States through which it passes, are so generally known, that we shall forbear to state them further than may be necessary for the purpose of showing the character of the present controversy, and explaining the principles upon which the opinion of this court is founded.

The road in question is the principal line of communication between the seat of government and the great valley of the Mississippi. It passes through Maryland, Pennsylvania, Virginia, and Ohio, and was constructed at an immense expense by the United States, under the authority of different and successive acts of congress; the States contributing nothing either to the making of the road or to the purchase of land over which it passes. They did nothing more than enact laws authorizing the United States to construct the road within their respective limits, and to obtain the land necessary for that purpose from the individual proprietors upon the payment of its value.

After the road had thus been made — although it was constructed with the utmost care, sparing no efforts to make it durable — it was still found to be incapable of withstanding the wear and tear produced by the number of carriages continually passing over it, en-

gaged in transporting passengers, or heavily laden with agricultural produce or merchandise; and that either a very great expense must be annually incurred in repairs, or the road, in a short time, would be entirely broken up and become unfit for use. As no permanent provision had been made for these repairs, applications were made to congress for the necessary funds; and as these demands upon the public treasury unavoidably increased, as the road was extended or

longer in use, they naturally produced a strong feeling of [*164] *dissatisfaction and opposition in those portions of the

Union which had no immediate interest in the road; and the constitutional power of congress to make these appropriations was also earnestly, and upon many applications, contested by many of the eminent statesmen of the country. It therefore became evident, that unless some other means than appropriations from the public treasury could be devised, a work which every one felt to be a great public convenience, in which a large portion of the Union was directly and deeply interested, and which had been constructed at so much cost, must soon become a total ruin.

In this condition of things, the State of Ohio, on the 4th of February, 1831, passed an act, proposing, with the assent of congress, to take under its care immediately the portion of the road within its limits which was then finished, and the residue from time to time as different parts of it should be completed, and to erect toll-gates thereon, and to apply the tolls to the repair and preservation of the road specifying in the law the tolls it proposed to demand, and containing a proviso in relation to the property of the United States, and to persons in its service, in the following words: "That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms, or military stores, belonging to the same, or to any of the States comprising this Union, or any person or persons on duty in the military service of the United States, or of the militia of any of the States." On the 2d of March,¹ in the same year, congress passed a law assenting to this act of Ohio, which is recited at large in the act of congress, with all its provisions and stipulations.

The measure proposed by the State of Ohio seems to have been received with general approbation; and on the 4th of April, 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed an act similar in its principles, but varying from it in

¹ 4 Stats. at Large, 483.

some respects on account of the different condition of the road in the two States. In Ohio, it was new and unworn, and therefore needed no repair; while in Pennsylvania, where it had been in use for several years, it was in a state of great dilapidation. While proposing, therefore, to take it under the care of the State, and to charge the tolls specified in the act, it annexed a condition that the United States should first put so much of it as passed through that State in good repair, and an appropriation be also made by congress for erecting toll-houses and toll-gates upon it. The clause in relation to the passage of the property of the United States over the road, also varies from the language of the Ohio law, and is in the following words: "That no toll shall be received or collected for the passage of any wagon or carriage laden with the property of * the United States, or any cannon or military stores belonging to the United States, or to any of the States composing this Union."

The example of Pennsylvania was followed by Maryland and Virginia, at the next succeeding sessions of their respective legislatures; the law of Maryland being passed on the 23d of January, 1832, and the Virginia law on the 7th of February following. The proviso in relation to the property of the United States, in the Maryland act, is precisely the same with that of Pennsylvania, and would seem to have been copied from it, while the proviso in the Virginia law, upon this subject, follows almost literally the law of Ohio.

With these several acts of assembly before them, congress, on the 3d of July, 1832,¹ passed a law declaring the assent of the United States to the laws of Pennsylvania and Maryland, to remain in force during the pleasure of congress; and the sum of \$150,000 was appropriated to repair the road east of the Ohio River, and to make the other needful improvements required by the laws of these two States. No mention is made of Virginia in this act of congress, because in her law the previous reparation of the road, and the erection of toll-houses and gates, at the expense of the United States, was not in express terms made the condition upon which she accepted the surrender of the road; but the assent of congress was afterwards given to her law by the act of March 2, 1833,² which, like the contract with the two other States, was to remain in force during the pleasure of congress.

The sum appropriated, as above mentioned, was, however, found insufficient for the purposes for which it was intended, and by an act of June 24, 1834,³ the further sum of \$300,000 was appropriated; and

¹ 4 Stats. at Large, 553² Ib. 655.³ Ib. 680.

this act states the appropriation to be made for the entire completion of the road east of the Ohio, and other needful improvements, to carry into effect the laws of Pennsylvania, Maryland, and Virginia, each of which is particularly referred to in the act of congress; and further directs that as far as that sum is expended, or so much of it as shall be necessary, the road should be surrendered to the States respectively through which it passed. But so greatly had the road become dilapidated, that even these large sums were found inadequate to place it in a proper condition, and by the act of March 3, 1835, the further sum of \$346,188.58, was appropriated; but this law directed that no part of it should be paid or expended until the three States should respectively accept the surrender; and that the United States "should not thereafter be subject to any expense in relation to the said road." Under this act of congress, the surrender was accordingly accepted, in 1835, and the money applied as directed by the act of congress, and from that time the road has been in the possession of and under the control of the several States, with toll-gates upon it.

This is the history of the road, and of the legislation of congress and the States upon that subject, (so far as it is necessary now to state it,) up to the time when the road passed into the hands of the States. We shall have occasion hereafter to speak more particularly of the act of congress last mentioned because it is the act under which the States finally took possession of the road.

When the new arrangement first went into operation, no toll was charged in any of the States upon carriages transporting the mail of the United States; and no toll upon such carriages has ever yet been claimed in Ohio, Maryland, or Virginia. But on the 13th of June, 1836, the State of Pennsylvania passed a law, declaring that carriages, &c., carrying the property of the United States or of a State, which were exempted from the payment of toll by the act of 1831, should thereafter be exempted only in proportion to the amount of property in such carriage belonging to the United States or a State; and, "that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance shall pay half-toll upon such modes of conveyance." And we are now to inquire whether this half-toll can be imposed upon carriages carrying the mail under the compact between the United States and Pennsylvania.

It will be seen from this statement, that the constitutional power of the general government to construct this road is not involved in the case before us; nor is this court called upon to express any opin-

ion upon that subject; nor to inquire what were the rights of the United States in the road previous to the compacts hereinbefore mentioned. The road had in fact been made at the expense of the general government. It was the great line of connection between the seat of government and the western States and territories, affording a convenient and safe channel for the conveyance of the mails, and enabling the government thereby to communicate more promptly with its numerous officers and agents in that part of the United States west of the Alleghany Mountains. The object of the compacts was to preserve the road for the purposes for which it had been made. The right of the several States to enter into these agreements will hardly be questioned by any one. A State may undoubtedly grant to an individual or a corporation a right of way through its territory upon such terms and conditions as it thinks proper; and we see no reason why it may not deal in like manner with the United States, when the latter have the power to enter into the contract. Neither do we see any just ground for questioning the power of congress. The constitution gives it the power to establish post-offices and post-roads; and charged, as it thus is, with the transportation of the mails, it would hardly have performed its duty to the country, if it had suffered this important line of communication to fall into utter ruin, and sought out, as it must have done, some circuitous or tardy and difficult route, when, by the immediate payment
* of an equivalent, it obtained in perpetuity the means of [*167] performing efficiently a great public duty, which the constitution has imposed upon the general government. Large as the sum was which it paid for repairs, it was evidently a wise economy to make the expenditure. It secured this convenient and important road for its mails, where the cost of transporting them is comparatively moderate, instead of being compelled to incur a far heavier annual expense, as they must have done, if, by the destruction of this road, they had been forced upon routes more circuitous or difficult, when much higher charges must have been demanded by the contractors. Certainly, neither Ohio, nor Pennsylvania, nor Maryland, nor Virginia, appear from their laws to have doubted their own power or the power of congress. But we do not understand, that Pennsylvania now upon any ground disputes the validity of the compact or denies her obligation to perform it; on the contrary, she asserts her readiness to fulfil it in all its parts, according to its true meaning but denies the construction placed upon it by the United States. It is to that part of the case, therefore, that it becomes the duty of the court to turn its particular attention.

It is true, that in the law of Pennsylvania, and of Maryland also

assented to by congress, the exemption of carriages engaged in carrying the mail is not so clearly and specifically provided for as in the laws of Ohio and Virginia. But in interpreting these contracts the character of the parties, the relation in which they stand to one another, and the objects they evidently had in view, must all be considered. And we should hardly carry out their true meaning and intention if we treated the contract as one between individuals, bargaining with each other with adverse interests, and should apply to it the same strict and technical rules of construction that are appropriate to cases of that description. This, on the contrary, is a contract between two governments deeply concerned in the welfare of each other; whose dearest interests and happiness are closely and inseparably bound up together, and where an injury to one cannot fail to be felt by the other. Pennsylvania, most undoubtedly, was anxious to give to the general government every aid and facility in its power, consistent with justice to its own citizens, and the government of the United States was actuated by a like spirit.

This was the character of the parties and the relation in which they stood. Besides, a considerable number of the citizens of the State had a direct interest in the preservation of the road; and the State had manifested its sense of the importance of the work by the act of assembly of 1807, which authorized the construction of the road within its limits; and again in the resolution passed in 1828, by which it proposed to confer upon congress the power of erecting gates and charging toll. Yet the only value of this road to the general government, worth considering, is for the transportation of the mails; and in that point of view it is far more important than any other post-road in the Union. Occasionally, indeed, arms or military stores may be transported over it; and sometimes a portion of the military force may pass along it. But these occasions for its use, especially in time of peace, but rarely occur; the daily and necessary use of the road by the United States is as a post-road, forming an almost indispensable link in the chain of communication from the seat of government to its western borders.

Now, as this was well known to the parties, can it be supposed that when Pennsylvania, by her act of 1831, proposed to take the road, and keep it in repair from the tolls collected upon it, and exempted from toll carriages laden with the property of the United States, she yet intended to charge it upon the mails? That in return for the large expenditure she required to be made, before she would receive the road, she confined her exemption to matters of no

importance, and reserved the right to tax all that was of real value? And when congress assented to the proposition, and incurred such heavy expenses for repairs, did they mean to leave their mails through Maryland and Pennsylvania still liable to the toll out of which the road was to be kept in repair? Upon this point the act of congress of March 3, 1835, is entitled to great consideration. For it was under this law that the States finally took possession of the road and proceeded to collect the tolls. By so doing they assented to all the provisions contained in this act of congress; and one of them is an express condition, that the United States should not thereafter be subject to any expense in relation to the road. Yet under the argument, the expenses of the road are to be defrayed out of the tolls collected upon it. And if the mails in Pennsylvania and Maryland may be charged, it will be found, that instead of the entire exemption, for which the United States so expressly stipulated, and to which Pennsylvania agreed, a very large proportion of the expenses of repair will be annually thrown upon them. We do not think that either party could have intended, when the contract was made, to burden the United States in this indirect way for the cost of repairs. So far as the general government is concerned, it might as well be paid directly from the treasury. For nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the post-office department. It is not a contingent expense, which may or may not be incurred, and about which a contractor may speculate; but a certain and fixed amount, for which he must provide, and which, therefore, in his bid for the contract, he must add to the sum he would be otherwise willing to take. It is of no consequence to the United States whether charges for repairs are cast upon it through its treasury or post-office department. In either case it is not free from expense in relation to the road, according to the compact upon which it was surrendered to and accepted by the States.

Neither do the words of the law of Pennsylvania of 1831 require * a different construction. The United States have [* 169] unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of congress, consists of communications to or from the officers of the executive department, or members of the legislature, on public service, or in relation to matters of public concern. Nor can the word laden be construed to mean fully laden, for that would in effect de

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stroy the whole value of the exemption, and compel the United States to pay a toll even on its military stores and other property, unless every wagon or carriage employed in transporting it was as heavily laden as it could conveniently bear. We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact; and that the act of congress of which we have spoken, and to which the State assented, must be taken in connection with the state law of 1831 in expounding this agreement. Consequently, the half toll imposed by the act of 1836 cannot be recovered.

The acts of assembly of Ohio and Virginia have been relied on in the argument by the plaintiff in error; and it has been urged that, inasmuch as the laws of these States, in so many words, exempt carriages carrying the mail of the United States, the omission of these words in the law in question shows that Pennsylvania intended to reserve the right to charge them with toll. And it is moreover insisted that, as the law of Ohio which contains this provision passed some time before the act of Pennsylvania, it ought to be presumed that the law of the latter was drawn and passed with a full knowledge of what had been done by the former, and that the stipulation in favor of the mail was designedly and intentionally omitted, because the State of Pennsylvania meant to reserve the right to charge it.

The court think otherwise. Even if the law of Ohio is supposed to have been before the legislature of Pennsylvania, it does not by any means follow that the omission of some of its words would justify the inference urged in the argument, where the words retained, by their fair construction, convey the same meaning. Indeed, if it appeared that the Ohio law was in fact before the legislature of Pennsylvania when it framed its own act upon the subject, it would rather seem to lead to a contrary conclusion. For it cannot be supposed that in the compact which the United States was about to form with four different States, and when the agreement with one would have been of no value without the others, Pennsylvania would have desired or asked for any privileges to herself which were not extended to the other States, nor that she would be less anxious to give every facility in her power to the general govern-
[* 170] ment * when carrying out through her territory the important and necessary operations of the post-office department. Nor could she have supposed that congress would give privileges to one State which were denied to others; and, after having done equal justice to all in the repair and preparation of the road wherever needed, make different contracts with the different States

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and, while it bargained for the exemption of its mails in one or more of them, consent to pay toll in another. The fact that they are clearly and explicitly exempted from toll in Ohio and Virginia, is a strong argument to show that it was intended to exempt them in all; and that the compacts with Pennsylvania and Maryland were understood and believed to mean the same thing, and to accomplish the same objects. And this conclusion is greatly strengthened by the fact that Maryland, where the words of the law are precisely the same with those of Pennsylvania, has never claimed the right to exact toll from carriages carrying the mail; nor did Pennsylvania claim it in the first instance, and they were always allowed to pass free until the act of 1836. Indeed, that law itself appears to recognize the right of the mail and other property of the United States to go free, and the imposition of only half toll would seem to imply that the State intended to reach other objects, and did not desire to lay the burden upon any thing that properly belonged to the United States. And so far as we can judge from its legislation, Pennsylvania has never to this day placed any other construction upon its compact than the one we have given, and has never desired to depart from it.

If we are right in this view of the subject, the error consists in the mode by which the State endeavored to attain its object. Unquestionably the exemption of carriages bearing the mail is no exemption of any other property conveyed in the same vehicle, nor of any person travelling in it, unless he is in the service of the United States, and passing along in pursuance of orders from the proper authority. Upon all other persons, although travelling in the mail stage, and upon their baggage or any other property, although conveyed in the same carriage with the mail, the State of Pennsylvania may lawfully collect the same toll that she charges either upon passengers or similar property in other vehicles. If the State had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll-gates thereon; and if the United States afterwards adopted it as a post-road, the carriages engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the State on other vehicles of the same kind. And as any rights which the United States might be supposed to have acquired in this road have been surrendered to the State, the power of the latter is as extensive in collecting toll as if the road had been made by herself, except *in so far as she is restricted by her compact; and [* 171] that compact does nothing more than exempt the carriages laden with the property of the United States, and the persons and

baggage of those who are engaged in their service. Toll may therefore be imposed upon every thing else in any manner passing over the road; restricting, however, the application of the money collected to the repair of the road, and to the salaries and compensation of the persons employed by the State in that duty.

It has been strongly pressed in the argument, that the construction placed upon the compact by the court would enable the contractors to drive every other line of stages from the road, by dividing the mail-bags among a multitude of carriages, each of which would be entitled to pass toll free, while the rival carriages would be compelled to pay it. And that by this means the contractors for carrying the mail would in effect obtain a monopoly in the conveyance of passengers throughout the entire length of the road, greatly injurious to the public, by lessening that disposition to accommodate which competition is sure to produce, and enhancing the cost of travelling beyond the limits of a fair compensation.

The answer to this argument is, that under the agreement they have made, according to its just import, the United States cannot claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail. And if measures such as are suggested were adopted by the contractors, it would be a violation of the compact. The postmaster-general has unquestionably the right to designate not only the character and description of the vehicle in which the mail is to be carried, but also the number of carriages to be employed on every post-road. And it can scarcely, we think, be supposed, that any one filling that high office, and acting on behalf of the United States, would suffer the true spirit and meaning of the contract with the State to be violated or evaded by any contractor acting under the authority of his department. But undoubtedly, if such a case should ever occur, the contract, according to its true construction, could be enforced by the State in the courts of justice; and every carriage beyond the number reasonably sufficient for the safe, speedy, and convenient transportation of the mail, would be liable to the toll imposed upon similar vehicles owned by other individuals. In a case where an error in the post might be so injurious to the public, it would certainly be necessary that the abuse should be clearly shown before the remedy was applied. But there can be no doubt, that the compact in question, in the case supposed, would not shield the contractor, and upon a case properly made out and established, it would be the duty of a court of justice to enforce the payment of the tolls. No such fact, however, appears or is suggested in the case before us, and the judgment of the circuit court is therefore affirmed.

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* M'LEAN, J. I dissent from the opinion of the court. [*172] And as the case involves high principles and, to some extent, the action and powers of a sovereign State, I will express my opinion.

This was an amicable action to try whether the defendants, who are contractors for the transportation of the mail on the Cumberland road, are liable, under the laws of Pennsylvania, to pay toll for stages in which the mail of the United States is conveyed.

This road was constructed by the federal government through the State of Pennsylvania, with its consent. Whether this power was thus constitutionally exercised, is an inquiry not necessarily involved in the decision of this case. The road was made, and for some years it was occasionally repaired by appropriations from the treasury of the United States. These appropriations were made with reluctance at all times, and sometimes were defeated. This, as a permanent system of keeping the road in repair, was, of necessity, abandoned; and, with the assent of Pennsylvania, congress passed a bill to construct toll-gates and impose a tax on those who used the road. This bill was vetoed by the President, on the ground that congress had no constitutional power to pass it. The plan was then adopted to cede the road, on certain conditions, to the States through which it had been established.

On the 4th of April, 1831, Pennsylvania passed "An act for the preservation of the Cumberland road."

By the 1st section it was provided, that as soon as the consent of the government of the United States shall have been obtained, certain commissioners, who were named, were to be appointed, whose duties in regard to the road were specially defined. The 2d section enacted, that to keep so much of the road in repair as lies in the State of Pennsylvania, and pay the expense of collection, &c., the commissioners should cause six toll-gates to be erected, and certain rates of toll were established. To this section there was a proviso, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States or to any of the States composing the Union."

By the 4th section the tolls were to be applied, after paying expenses of collection, &c., to the repairs of the road, the commissioners having power to increase them, provided they shall not exceed the rates of toll on the Harrisburg and Pittsburg road. The last section provided that the toll should not be altered below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, &c., and also, "that no change, alteration, or amendment shall ever be adopted, that will in anywise defeat or affect the true intent and meaning of this act."

By the 10th section of the above act it was declared to have no effect until congress should assent to the same, "and until [* 173] so much * of the said road as passes through the State of Pennsylvania be first put in good state of repair, and an appropriation made by congress for erecting toll-houses and toll-gates thereon, to be expended under the authority of the commissioners appointed by this act."

By their act of the 24th of June, 1834, congress appropriated \$300,000 to repair the Cumberland road east of the Ohio River, which referred to the above act of Pennsylvania, and also to similar acts passed by Virginia and Maryland. And in the 4th section of the act it was provided: "That as soon as the sum by this act appropriated, or so much thereof as is necessary, shall be expended in the repair of said road agreeably to the provisions of this act, the same shall be surrendered to the States respectively through which said road passes; and the United States shall not thereafter be subject to any expense for repairing said road." This surrender of the road was accepted by Pennsylvania, by an act of the 1st of April, 1835.

The above acts constitute the compact between the State of Pennsylvania and the Union, in regard to the surrender of this road. The nature and extent of this compact are now to be considered.

As before remarked, the constitutional power of congress to construct this road is not necessarily involved in this decision. By the act of congress of the 30th of April, 1802,¹ to authorize the people of Ohio to "form a constitution and state government," among other propositions for the acceptance of the State, it was proposed that "five per cent. of the net proceeds of the lands lying within the said State, sold by congress, should be applied to the laying out and making public roads leading from the navigable waters falling into the Atlantic, to the Ohio, to the said State, and through the same; such roads to be laid under the authority of congress, with the consent of the several States through which the roads shall pass: provided the State shall agree not to tax land sold by the government until after the expiration of five years from the time of such sale."

By the 2d section of the act of the 3d March, 1803,² three per cent. of the above fund was placed at the disposition of the State, to be "applied to the laying out, opening, and making roads, within the State."

The above conditions, having been accepted by Ohio, constituted the compact under which the Cumberland road was laid out and constructed by the authority of congress. And of this work it may be said, however great has been the expenditure through the inex-

¹ 9 Stats. at Large, 173.

² Ib. 225.

perience or unfaithfulness of public agents, that no public work has been so diffusive in its benefits to the country. It opened a new avenue of commerce between the eastern and western States. Since its completion, and while it was kept in repair, the annual transportation of goods and travel on it saved an expense equal to no inconsiderable part of the cost of the road. But its cession to the States * through which it was established was found neces- [* 174] sary to raise, by tolls, an annual revenue for its repair.

Whatever expenditure was incurred in the construction of this road beyond the two per cent. reserved by the compact with Ohio, was amply repaid by the beneficial results of the work; and this was the main object of congress. It was a munificent object, and worthy of the legislature of a great nation.

The road was surrendered to Pennsylvania and the other States through which it had been constructed. But what was ceded to Pennsylvania? All the right of the United States which was not reserved by the compact of cession. This right may be supposed to arise from the compact with Ohio; the consent of Pennsylvania to the construction of the road, and the expense of its construction, including the sums paid to individuals for the right of way. These, and whatever jurisdiction over the road, if any, might be exercised by the United States, were surrendered to Pennsylvania. The road then must be considered as much within the jurisdiction and control of Pennsylvania, excepting the rights reserved in the compact, as if it had been constructed by the funds of that State. It is, therefore, important to ascertain the extent of the rights reserved by the United States.

In the closing paragraph of the 2d section of the act of 1831, above cited, it is provided: "That no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the States composing this Union." In addition to this, there were certain limitations imposed, as to the amount of tolls, on the State of Pennsylvania, which need not now be considered.

Some light may be cast on the import of the above reservation by a reference to somewhat similar compacts made in regard to the same subject between the United States and the States of Ohio, Maryland, and Virginia. The Ohio act of the 2d of March, 1831, provides in the 4th section: "That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops,

arms, or military stores, belonging to the same, or to any of the States comprising this Union, or any person or persons on duty in the military service of the United States, or of the militia of any of the States." The 4th section of the Maryland act of the 23d of January, 1832, provided: "That no tolls shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the States composing this Union." In the Virginia act of the 7th of February, 1832, it is provided: "That no toll shall be received or collected for the passage of any [* 175] * stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with property of the United States, or any cavalry or other troops, army or military stores, belonging to the same, or to any of the States comprising this Union, or any person or persons on duty in the military service of the United States, or of the militia of any of the States."

The reservations in the Pennsylvania and Maryland acts are the same, and differ materially from those contained in the acts of Ohio and Virginia. In the latter acts the mail stage is excepted, but not in the former. Pennsylvania and Maryland exempt from toll "any wagon or carriage laden with the property of the United States;" but the same exemption is contained in the Ohio and Virginia laws in addition to that of the mail stage. Now, can the reservations in these respective acts be construed to mean the same thing? Is there no difference between the acts of Ohio and Pennsylvania? Their language is different, and must not their meaning be sought from the words in the respective acts? They are separate and distinct compacts. The Ohio law was first enacted, and was, probably, before the legislature of Pennsylvania when their act was passed. But whether this be the fact or not, they were both sanctioned by congress; and the question is, whether both compacts are substantially the same? That the legislatures did not mean the same thing seems to me to be clear of all doubt. Did congress, in acceding to these acts, consider that they were of the same import? Such a presumption cannot be sustained without doing violence to the language of the respective acts.

In both acts wagons laden with the property of the United States are exempted. In the Ohio act, the mail stage is exempted from toll, but not in the act of Pennsylvania. Now, is the mail-stage exempted from toll by both acts or by neither? Is not either of these positions equally unsustainable? The exemption of the mail-stage must be struck out of the Ohio law to sustain one of these

positions, and to sustain the other it must be inserted in the act of Pennsylvania. Does not the only difference consist in striking out in the one case and inserting in the other? This must be admitted unless the words, "wagon or carriage laden with the property of the United States," mean one thing in the Ohio law, and quite a different thing in the law of Pennsylvania. These words have a sensible and obvious application in both acts, without including the mail-stage. In the Ohio law, the words "no toll shall be received or collected for the passage of any stage or coach conveying the United States mail," cannot, by any sound construction, be considered as surplusage; and yet they must be so considered if the Pennsylvania act exempt the mail stage.

When one speaks of transporting the property of the United States, the meaning of the terms "property of the United States," is never mistaken. They mean munitions of war, provisions purchased *for the support of the army, and any other prop- [*176] erty purchased for the public revenue. They do not mean the mail of the United States. A wagon laden with property is understood to be a wagon used for the transportation of property, in the ordinary sense of such terms. A wagon or carriage being laden is understood to have a full or usual load. The mail stage of the United States is never spoken of in this sense. It is used for the transportation of passengers as well as the mail, and in this view it is undoubtedly considered when spoken of in conversation, and especially when referred to in a legislative act. In no sense can the mail stage be considered a "carriage laden with the property of the United States." The same exception applies to a wagon or carriage laden with the property of a State. Now no one can doubt the meaning of the exception thus applied. And can a different meaning be given to the same words when applied to the United States? Certainly not, unless the mail can be denominated the property of the United States.

The mail of the United States is not the property of the United States. What constitutes the mail? Not the leathern bag, but its contents. A stage load of mail-bags could not be called the mail. They might be denominated the property of the United States, but not the mail. The mail consists of packets of letters made up with post-bills, and directed to certain post-offices for distribution or delivery; and whether these be conveyed in a bag or out of it, they are equally the mail; but no bag without them is or can be called the mail. Can these packets be said to be the property of the United States? The letters and their contents belong to individuals. No officer in the government can abstract a letter from the mail, not

directed to him, without incurring the penalty of the law. And can these letters or mailed pamphlets or newspapers be called the property of the United States? They in no sense belong to the United States, and are never so denominated. If a letter be stolen from the mail which contains a bank-note, the property in the note is laid in the person who wrote the letter in which the note is inclosed. From these views, I am brought to the conclusion that neither party to the compact under consideration could have understood "a wagon or carriage laden with the property of the United States," as including the mail stage of the United States.

Are there any considerations connected with this subject which lead to a different conclusion from that stated. The fact that four distinct compacts were entered into with four States to keep this road in repair, cannot have this effect. We must judge of the intention of the parties to the compact by their language. I know of no other rule of construction. Two of these compacts exempt the mail stage from toll, and two of them do not exempt it. Now, if the same construction, in this respect, must be given to all [*177] of them, * which of the alternatives shall be adopted? Shall the mail stage be exempted by all of them, or not exempted by any of them?

What effect can the expenditures of the United States in the construction of this road, have upon this question? In my judgment, none whatever. The reservation must be construed by its terms, and not by looking behind it. The federal government has been amply repaid for the expenditures in the construction of this road, great and wasteful as they may have been, by the resulting benefits to the nation. It is now the road of Pennsylvania, subject only to the terms of the compact. In the act surrendering this road to the States respectively, through which it passes, congress say: "And the United States shall not thereafter be subject to any expense for repairing said road." To get clear of this expense was the object of the cession of it to the States. But does this affect the question under consideration? The repairs of the road are provided for, by the tolls which the State of Pennsylvania is authorized to impose. And this is the meaning of the above provision. It is supposed that the exaction of toll on the mail stage would conflict with that provision. But how does it conflict with it? The toll on the mail-stage is not paid by the government, but by the contractor. And whether this toll will increase the price paid by the government for the transportation of the mail, is a matter that cannot be determined. Competition is invited, and bids are made for this service, and the price to be paid depends upon contingent circumstances. The toll

would be paid, in part, if not in whole, by a small increase of price for the transportation of passengers. The profits of the contractor might, perhaps, be somewhat lessened by the toll, or it might increase, somewhat, the cost of conveying the mail. But this is indirect and contingent, so that in no sense can it be considered as repugnant to the above provision. "The United States are not to be subject to any expense for repairing this road;" and they are not, in the sense of the law, should the post-office department have to pay, under the contingencies named, a part of the toll stated. Whether it does pay it or not, under future contracts, cannot be known; and whatever expense it may pay, will be for the use, and not the repair of the road.

The act of the 13th of June, 1836, which is supposed to be in violation of the compact, I will now consider. That act provides: "That all wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland road which passes through Pennsylvania, carrying goods, cannon, or military stores belonging to the United States, or to any individual State of the Union, which are excepted from the payment of toll by the 2d section of an act passed the 4th of April, 1831, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance, from the payment of toll to the proportional amount of such goods

* so carried belonging to the United States, or to any of the [* 178] individual States of the Union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such modes of conveyance."

By the act of 1831, "every chariot, coach, coachee, stage, wagon, phaeton, or chaise, with two horses and four wheels, were to be charged at each gate twelve cents; for either of the carriages last mentioned, with four horses, eighteen cents." Is the act of 1836, which imposes half toll on "the mail stage, with passengers or goods," repugnant to the above provision? I think it is not, in any respect.

If the mail be not the property of the United States, then the stage in which it is conveyed is not within the exception of the act of 1831, and it is liable to pay toll. That only which is within the exception is exempted. That the mail is in no sense the property of the United States, and was not so understood by the parties to the compact, has already been shown. It follows, therefore, that a law of Pennsylvania, imposing on such stage a half or full rate of toll, is no violation of the compact.

But, if the mail stage were placed on a footing with a wagon or carriage laden with the property of the United States, is the act of 1836, requiring it to pay toll, a violation of the compact? I think it is not. A wagon or carriage laden with the property of the United States, means a wagon or carriage having, as before remarked, a full or usual load. Such a vehicle is exempted from toll by the act of 1831. But suppose such wagon or carriage should have half its load or the property of the United States, and the other half of the property of individuals, for which the ordinary price for transportation was paid, is such a wagon, thus laden, exempted from toll? Surely it is not. An exemption, under such circumstances, would be a fraud upon the compact. It should be required to pay half toll, and this is what the law of Pennsylvania requires. The mail stage, by that law, is only half toll when it conveys passengers with the mail. There is, then, no legal objection to the exaction of this toll. It is in every point of view just, and within the spirit of the compact.

In the argument for the United States, the broad ground was assumed, that no State had the power to impose a toll on a stage used for the transportation of the mail. That it is a means of the federal government to carry into effect its constitutional powers, and, consequently, is not a subject of state taxation. To sustain this position, the cases of *McCulloch v. The State of Maryland*, 4 Wheat. 316, and *Dobbins v. The Commissioners of Erie county*, 16 Pet. 435, were cited.

In the first case, this court held, "that a state government [* 179] had no *right to tax any of the constitutional means employed by the government of the Union, to execute its constitutional powers." And the Bank of the United States was held to be a means of the government. In the second case, under a general law of Pennsylvania imposing a tax on all officers, a tax was assessed on the office held by the plaintiff, as captain of a revenue cutter of the United States, and this court held that such law, so far as it affected such an officer, was unconstitutional and void. The court say: "There is a concurrent right of legislation in the States and the United States, except as both are restrained by the constitution of the United States. Both are restrained by express prohibitions in the constitution; and the States, by such as are reciprocally implied when the exercise of a right by a State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments and emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign power."

Neither of these cases reach or affect the principle involved in the case under consideration. The officer of the United States was considered as a means or instrument of the government, and, therefore, could not be taxed by the State as an officer. To make that case the same in principle as the one before us, the officer must claim exemption from toll as a means of the government, in passing over a toll-bridge or turnpike road constructed by a State, or by an association of individuals, under a state law. The principle of the other case is equally inapplicable. Maryland taxed the franchise of the Bank of the United States, and if the law establishing that bank were constitutional, the franchise was no more liable to taxation by a State, than rights and privileges conferred on one or more individuals, under any law of the Union. With the same propriety a judge of the United States might be subjected to a tax by a State for the exercise of his judicial functions. And so of every other officer and public agent. But the court held that the stock in the bank owned by a citizen might be taxed.

A toll exacted for the passage over a bridge or on a turnpike road is not, strictly speaking, a tax. It is a compensation for a benefit conferred. Money has been expended in the construction of the road or bridge, which adds greatly to the comforts and facilities of travelling, and on this ground compensation is demanded. Now, can the United States claim the right to use such road or bridge free from toll? Can they place locomotives on the railroads of the States or companies, and use them by virtue of their sovereignty? Such acts would appropriate private property for public purposes, without compensation, and this the constitution of the Union prohibits.

It is said in the argument, that as well might a revenue cutter be taxed by a State as to impose a toll on the stage which conveys the mail. The revenue cutter plies on the thoroughfare of nations, or of the State, which is open to all vessels. But [* 180] the stage passes over an artificial structure of great expense, which is only common to all who pay for its use a reasonable compensation. There can be no difficulty on this point. At no time, it is believed, has the post-office department asserted the right to use the turnpike roads of a State, in the transmission of the mail, free from toll.

Pennsylvania stands pledged to keep the road in repair, by the use of the means stipulated in the compact. And she has bound herself, "that no change, alteration, or amendment shall ever be adopted, that will in anywise defeat or affect the true intent and meaning of the act of 1831." In my judgment that State has in no respect violated the compact by the act of 1836. If the mail stage

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can be included in the exemption by the terms "wagon or carriage laden with the property of the United States," still, the half toll on such stage, when it contains passengers, is within the compact. But, as has been shown, the mail stage is not included in the exemption, and, consequently, it was liable to be charged with full toll. The State, therefore, instead of exceeding its powers under the compact, has not yet exercised them to the extent which the act of 1831 authorizes.

DANIEL, J. With the profoundest respect for the opinions of my brethren, I find myself constrained openly to differ from the decision which, on behalf of the majority of the court, has just been pronounced. This case, although in form a contest between individuals, is in truth a question between the government of the United States and the government of Pennsylvania. It is, to a certain extent, a question of power between those two governments; and, indeed, so far as it is represented to be a question of compact, the very consideration on which the interests of the federal government are urged, involves implications affecting mediately or directly what are held to be great and fundamental principles in our state and federal systems. It brings necessarily into view the operation and effect of the compact insisted upon as controlled and limited by the powers of both the contracting parties. In order to show more plainly the bearing of the principles above mentioned upon the case before us, they will here be more explicitly, though cursorily, referred to.

I hold, then, that neither congress nor the federal government, in the exercise of all or any of its powers or attributes, possesses the power to construct roads, nor any other description of what have been called internal improvements, within the limits of the States. That the territory and soil of the several States appertain to them by title paramount to the constitution, and cannot be taken, save with the exceptions of those portions thereof which might be ceded for the seat of the federal government, and for sites permitted to be purchased for forts, arsenals, dock-yards, &c., &c. That the [* 181] power of the * federal government to acquire, and that of the States to cede to that government portions of their territory, are by the constitution limited to the instances above adverted to, and that these powers can neither be enlarged nor modified but in virtue of some new faculty to be imparted by amendments of the constitution. I believe that the authority vested in congress by the constitution to establish post-roads, confers no right to open new roads, but implies nothing beyond a discretion in the government in the regulations it may make for the post-office department for the se-

lection amongst various routes, whilst they continue in existence, of those along which it may deem it most judicious to have the mails transported. I do not believe that this power given to congress expresses or implies any thing peculiar in relation to the means or modes of transporting the public mail, or refers to any supposed means or modes of transportation beyond the usual manner existing and practised in the country; and certainly it cannot be understood to destroy or in anywise to affect the proprietary rights belonging to individuals or companies vested in those roads. It guarantees to the government the right to avail itself of the facilities offered by those roads for the purposes of transportation, but imparts to it no exclusive rights—it puts the government upon the footing of others who would avail themselves of the same facilities.

In accordance with the principles above stated, and which with me are fundamental, I am unable to perceive how the federal government could acquire any power over the Cumberland road by making appropriations, or by expending money to any amount for its construction or repair, though these appropriations and expenditures may have been made with the assent, and even with the solicitation of Pennsylvania. Neither the federal government separately, nor conjointly with the State of Pennsylvania, could have power to repeal the constitution. Arguments drawn from convenience or inconvenience can have no force with me, in questions of constitutional power; indeed, they cannot be admitted at all; for if once admitted, they sweep away every barrier erected by the constitution against implied authority, and may cover every project which the human mind may conceive. It matters not, then, what or how great the advantage which the government of the United States may have proposed to itself or to others in undertaking this road; such purposes or objects could legitimate no acts either expressly forbidden or not plainly authorized. If the mere appropriation or disbursement of money can create rights in the government, they may extend this principle indefinitely, and with the very worst tendencies. Those tendencies would be the temptation to prodigality in the government, and a dangerous influence with respect to others.

In my view, then, the federal government could erect no toll-gates nor make any exaction of tolls upon this road; nor could that government, in consideration of what it had done or contributed, * constitutionally and legally demand of the State of [* 182] Pennsylvania the regulation of tolls, either as to the imposition of particular rates or the exemption of any species of transportation upon it. As a matter of constitutional and legal power and authority, this appertained to the State of Pennsylvania exclu-

sively. Independently, then, of any stipulations with respect to them, vehicles of the United States, or vehicles transporting the property of the United States, and that property itself, would, in passing over this road, be in the same situation precisely with vehicles and property appertaining to all other persons; they would be subject to the tolls regularly imposed by law. There can be no doubt if the road were vested in a company or in a State, that either the company or the State might stipulate for any rate of toll within the maximum of their power, or might consent to an entire exemption; and such stipulation, if made for a valuable or a legal consideration, would be binding.

The United States may contract with companies or with communities for the transportation of their mails, or any of their property, as well as with carriers of a different description; and consequently could contract with the State of Pennsylvania. But what is meant to be insisted on here is, that the government could legally claim no power to collect tolls, no exemption from tolls, nor any diminution of tolls in their favor, purely in consequence of their having expended money on the road, and without the recognition by Pennsylvania of that expenditure as a condition in any contract they might make with that State. Without such recognition, the federal government must occupy the same position with other travellers or carriers, and remain subject to every regulation of her road laws which the State could legally impose on others.

This brings us to an examination of the statutes of Pennsylvania, and to an inquiry into any stipulations which the State is said to have made with the federal government, as declared in those statutes. That examination will, however, be premised by some observations, which seem to be called for on this occasion. These acts of the Pennsylvania legislature have been compared with the acts of other legislative bodies relative to this road, and it has been supposed that the Pennsylvania laws should be interpreted in conjunction with those other state laws; and further, that all these separate state enactments should be taken, together with the acts of congress passed as to them respectively, as forming one, or as parts of one entire compact with the federal government. I cannot concur in such a view of this case. On the contrary, I must consider each of the States that have legislated in respect to this road as competent to speak for herself; as speaking in reference to her own interests and policy, and independently of all others, and unshackled by the proceedings of any others. By this rule of construction, let us examine the statutes of Pennsylvania. The act of April 4, 1831, which may be called the compact law, as it contains all that Pennsylvania pro-

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fessed to undertake, * begins by stating the doubts which [* 183] were entertained upon the authority of the United States to erect toll-gates and collect tolls on the Cumberland road; doubts which, with the government as well as with others, seem to have ripened into certainties, inasmuch as, notwithstanding its large expenditures upon this road, the government had never exacted tolls for travelling or for transportation upon it. The statute goes on next to provide, that if the government of the United States will make such further expenditures as shall put the road lying within the limits of Pennsylvania in complete repair, Pennsylvania will erect toll-gates and collect tolls upon the road, to be applied to the repairs and preservation of it. The same act invests the commissioners it appoints to superintend the road, with power to increase or diminish the tolls to be levied; limiting the increase by the rates which the State had authorized upon an artificial road that she had established from the Susquehanna, opposite the borough of Harrisburg, to Pittsburg. Then, in the act of 1831, are enumerated the subjects of toll, and the rates prescribed as to each of these subjects. Amongst the former are mentioned chariots, coaches, coaches, stages, wagons, phaetons, chaises. In the 3d proviso to the 2d section it is declared, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the States belonging to this Union." On the 13th of June, 1836, was passed by the legislature of Pennsylvania: "An act relating to the tolls on that part of the Cumberland road which passes through Pennsylvania." The 1st section of this act is in the following words: "All wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland road which passes through Pennsylvania, carrying goods, cannon, or military stores, belonging to the United States, or to any individual State of the Union, which are excepted from the payment of toll by the second section of an act passed the fourth of April, anno Domini eighteen hundred and thirty-one, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance, from the payment of toll to the proportional amount of such goods so carried, belonging to the United States, or to any of the individual States of the Union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such modes of conveyance."

Upon the construction to be given to the 1st and 2d sections of the statute of 1831, and to the 1st section of the statute of 1836,

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depends the decision of the case before us. By the defendant in error it is insisted that, by the sections of the act of 1831 above cited, stages or stage-coaches, transporting the mail of the United States, are wholly exempted by compact from the payment of tolls, although the mails may constitute but a small portion of [* 184] their lading; and * those vehicles may be at the same time freighted, for the exclusive profit of the mail contractors, with any number of passengers, or with any quantity of baggage or goods, which can be transported in them, consistently with the transportation of the mail; and that the 1st section of the act of 1836, which declares that "in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such mode of conveyance," is a violation of the compact. Let us pause here, and inquire what was the natural and probable purpose of the exemption contained in the act of 1831? Was that exemption designed as a privilege or facility to the government, or as a donation for private and individual advantage? Common sense would seem to dictate the reply, that the former only was intended by the law; and even if the privilege or facility to the government could be best secured by associating it with individual profit, certainly that privilege or facility could, on no principle of reason or fairness, be so sunk, so lost sight of, so entirely perverted, as to make it a mean chiefly of imposition and gain on the part of individuals, and the cause of positive and serious public detriment; and such must be the result of the practice contended for by the defendants in error, as it would tend to impede the celerity of transportation, and to destroy the road itself, by withholding the natural and proper fund for its maintenance. Passing, then, from what is believed to be the natural design of these enactments, let their terms and language be considered. By those of the 2d section of the law of 1831, every stage or wagon is made expressly liable to toll, without regard to the subjects it might transport, and without regard to the ownership of the vehicle itself. The terms of the law are universal; they comprehend all stages and all wagons; they would necessarily, therefore, embrace stages and wagons of the United States, or the like vehicles of others carrying the property of the United States or of private persons. If, then, either the vehicles of the United States, or of others carrying the property of the United States, have been withdrawn from the operation of the act of 1831, this can have been done only by force of the 3d proviso of the 2d section of that act. The proviso referred to declares, that no toll shall "be collected for the passage of any wagon or carriage

laden with the property of the United States," &c. &c. Can this proviso be understood as exempting stages, whether belonging to the government or to individuals, which were intended purposely to carry the mail? It is not deemed necessary, in interpreting this proviso, to discuss the question, whether the United States have a property in the mails which they carry. It may be admitted that the United States and all their contractors have in the mails that property which vests by law in all common carriers; it may be admitted that the United States have an interest in the mails even beyond this. These admissions do not vary the real inquiry here, * which is, whether by this proviso the mails of [* 185] the United States, or the carriages transporting them, were intended to be exempted from tolls? This law, like every other instrument, should be interpreted according to the common and received acceptation of its words; and artificial or technical significations of words or phrases should not be resorted to, except when unavoidable, to give a sensible meaning to the instrument interpreted; or when they may be considered as coming obviously within the understanding and contemplation of the parties. According to this rule of interpretation, what would be commonly understood by "the property of the United States," or by the phrase "wagons and carriages laden with the property of the United States?" Would common intendment apply those terms to the mail of the United States, or to vehicles carrying that mail? The term "mail" is perhaps universally comprehended as being that over which the government has the management, for the purposes of conveyance and distribution; and it would strike the common understanding as something singular, to be told that the money or letters belonging to the citizen, and for the transportation of which he pays, was not his property, but was the property of the United States. The term "mail," then, having a meaning clearly defined and universally understood, it is conclusive to my mind that, in a provision designed to exempt that mail, or the vehicle for its transportation, the general and equivocal term "property" would not have been selected, but the terms "mail," and "stages carrying the mail," terms familiar to all, would have been expressly introduced.

Further illustration of the language and objects of the legislature of Pennsylvania may be derived from the circumstance, that, in the law of 1831, they couple the phrase "property of the United States" with "property of the States." The same language is used in reference to both; they are both comprised in the same sentence; the same exemption is extended to both. Now the States have no mails to be transported. It then can by no means follow, either by neces-

sary or even plausible interpretation, that by "property of the United States," was meant the "mails of the United States," any more than by "property of the States" was meant the "mails" of those States; on the contrary, it seems far more reasonable that the legislature designed to make no distinction with regard to either, but intended that the term "property" should have the same signification in reference both to the state and federal governments.

In the acceptation of the term "property," insisted on for the defendants in error, the mails committed to the contractor are the property of that contractor also. Yet it would hardly have been contended that in a provision for exempting the "property" of a mail contractor from tolls, either a vehicle belonging to the United States, and in the use of such a contractor, or the mail which he carried in it, would be so considered as his property as to bring them within that exemption; yet such is the conclusion to which the [*186] interpretation contended for by the defendants would inevitably lead. That construction I deem to be forced and artificial, and not the legitimate interpretation of the statute, especially when I consider that there are various other subjects of property belonging to the United States, and belonging to them absolutely and exclusively, which from their variety could not well be specifically enumerated, and which, at some period or other, it might become convenient to the government and beneficial to the country to transport upon this road. But if, by any interpretation, the words "wagon or carriage laden with the property of the United States," can be made to embrace stages carrying the mail, and employed purposely for that service, they surely cannot, by the most forced construction be made to embrace stages laden with every thing else, by comparison, except the mail of the United States, and in which the mail was a mere pretext for the transportation of passengers and merchandise, or property of every description and to any amount, free of toll. They must at all events be laden with the mail. The term laden cannot be taken here as a mere expletive, nor should it be wrested from its natural import — be made identical in signification with the terms "carrying" or "transporting." Such a departure would again be a violation of common intendment, and should not be resorted to; and the abuses just shown, which such a departure would let in and protect, furnish another and most cogent reason why the common acceptation of the phrase, "property of the United States," should be adhered to. Fairness and equality with respect to all carriers and travellers upon this road, and justice to the State which has undertaken to keep it in repair from the tolls collectable upon it, require this adherence.

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If the interpretation here given of the act of 1831 be correct, then, admitting that act to be a compact between Pennsylvania and the United States, the former has, by the 1st section of the act of 1836, infringed no stipulation in that compact. Pennsylvania never did, according to my understanding of her law of 1831, agree to the exemption from tolls for stages, wagons, or vehicles of any kind, intended for carrying the mails of the United States. These stood upon the like footing with other carriages. If this be true, then by the act of 1836, in which she has subjected to half tolls only, stages, wagons, &c., carrying the mails, and at the same time transporting passengers or goods, so far from violating her compact, or inflicting a wrong upon the government or upon mail contractors, that State has extended to them a privilege and an advantage which, under the 3d proviso of the act of 1831, they did not possess. My opinion is, that the plaintiff in the court below had an undoubted right of recovery.

3 H. 720; 12 H. 293.

Lessee of ANGELICA CROGHAN *et al.*, Plaintiff, v. JOHN NELSON, Defendant.

3 H. 187.

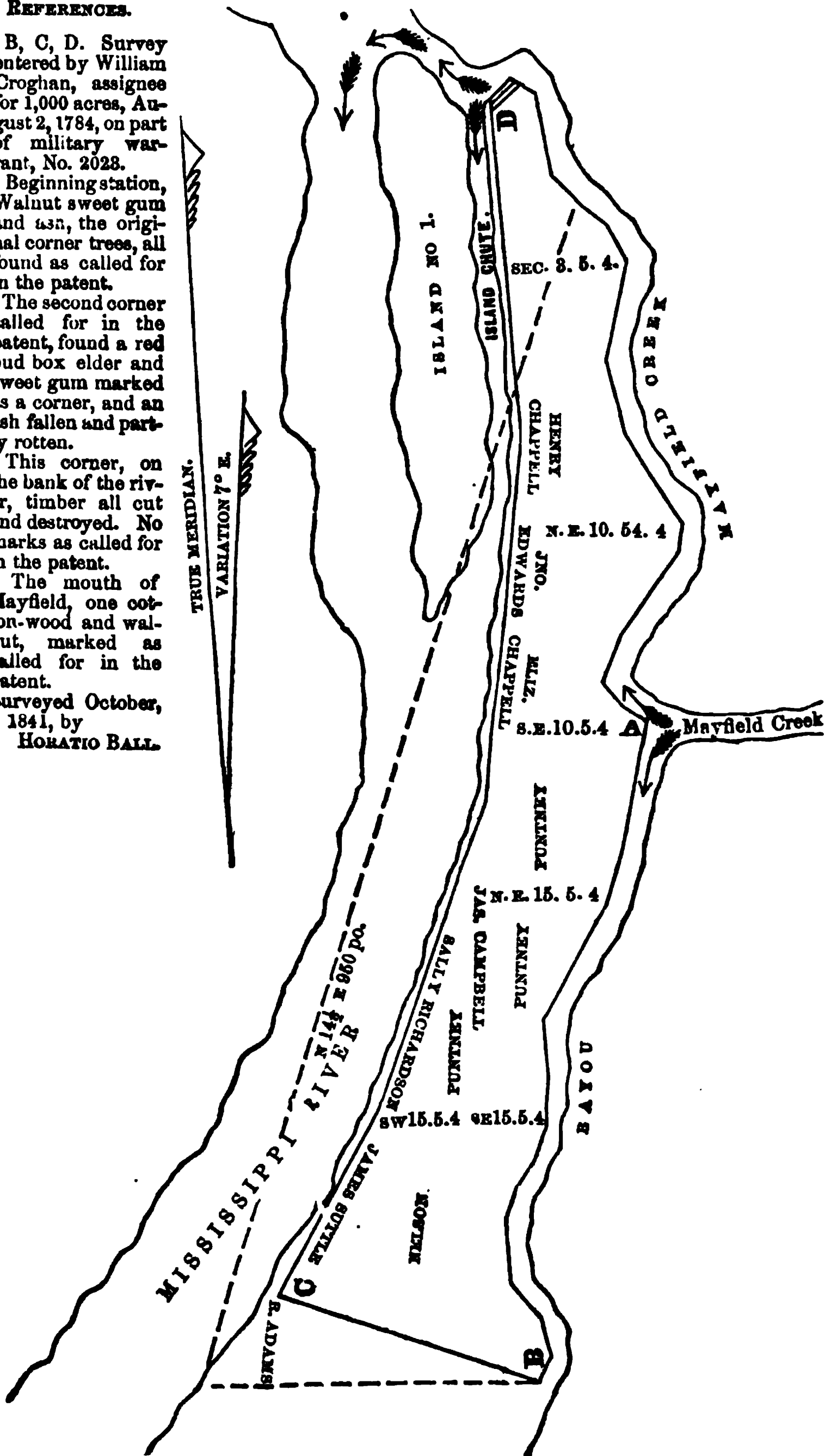
If it is practicable, by a reasonable construction of an entry, to include the whole quantity of land called for, it is to be included.

The call to run one line parallel to another, if repugnant to the call for the quantity, may be disregarded, if the other calls, and that for quantity, sufficiently identify the land.

THE case is stated in the opinion of the court. The plat referred to was as follows :—

REFERENCES.

- A, B, C, D. Survey entered by William Croghan, assignee for 1,000 acres, August 2, 1784, on part of military warrant, No. 2028.
- A. Beginning station, Walnut sweet gum and ash, the original corner trees, all found as called for in the patent.
- B. The second corner called for in the patent, found a red bud box elder and sweet gum marked as a corner, and an ash fallen and partly rotten.
- C. This corner, on the bank of the river, timber all cut and destroyed. No marks as called for in the patent.
- D. The mouth of Mayfield, one cotton-wood and walnut, marked as called for in the patent.
- Surveyed October, 1841, by
HORATIO BALL.



* M'KINLEY, J., delivered the opinion of the court. [* 190]

This is a case certified to this court from the circuit court for the district of Kentucky.

The plaintiffs brought an action of ejectment, in that court, against the defendants; and to support their action, they read to the jury a patent for 1,000 acres of land, granted by the State of Kentucky to Charles Croghan, bearing date the 29th of November, 1826, and proved title in themselves by the will of the said Charles Croghan. The plat marked A was shown to the jury; and the surveyor proved that the fork of Mayfield Creek, at the letter A, was correctly laid down; that 500 poles, on a straight line, on the branch leading from Mayfield Creek, would extend the line from letter B, on the * plat, where one of the patent corners was found; and that [* 191] the plat truly represented the land granted by the patent.

The defendant then read the following entry of William Croghan, assignee, for 1,000 acres, dated 16th of August, 1784, on which the patent is founded, to wit: "William Croghan, assignee, enters 1,000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield Creek, about two miles by water above Fort Jefferson, where a branch, occasioned by the high waters from the Mississippi, runs out of said creek, and at high water empties into the river at the upper end of the iron banks; from said beginning 500 poles, when reduced to a straight line; and then off from the branch towards the Mississippi, on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek, to include the quantity." The defendants then offered in evidence a patent from the State of Kentucky to Hugh Nelson, for 103 acres of land, bearing date the 17th of December, 1830; and proved by the surveyor, that the beginning of the entry was at A, on the plat, and that the end of the first line was at B, and if a line were run from B towards the Mississippi River, in a direction parallel with the general course of Mayfield Creek, for twelve miles above the fork at A, it would be the red line extending from the letter B to the Mississippi River at F. It was also proved, if a line were run from the corner at B parallel with Mayfield Creek, below the fork, to the letter D, at the mouth of the creek, it would run from B to E, and leave out the land claimed by the defendants. The surveyor also proved, that the various lines on the plat were correctly laid down from actual survey.

"The counsel for the defendants then prayed the court to instruct the jury, if they believe, from the evidence, that the course of Mayfield Creek from A to D is correctly laid down, then a line from B towards the Mississippi River should be run parallel to that line, to

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conform to the entry; and if, in running that parallel line, they shall believe, from the evidence, that the improvement of the defendants is left out, they ought to find for the defendants. But the court were divided in opinion on the point, whether the second line called for in the entry should run from B to E, or whether the line from B to C should be taken and recognized as the true and proper line, it being the line on which the patent was founded. One of the judges being of the opinion that for all the land south and west of a line from B to E the patent was void; and the other judge being of a contrary opinion. They were also divided in opinion, for the foregoing reasons, whether the foregoing instructions ought to be given or refused."

By a statute of Kentucky, passed the 26th of December, 1820, it is required, that all surveys thereafter to be made on entries west of Tennessee River should be run according to the calls of the entry. And "to enable the register to ascertain whether the survey is made according to entry, a copy of the entry shall be returned to [* 192] the *register's office, with the plat and certificate of survey; and any patent issuing on a survey made contrary to the location shall be void to all intents and purposes, so far as the same may be different and variant from the location." The survey in this case was made on the 5th day of November, 1825; and the patent under which the defendants claim, dated the 17th day of December, 1830, was granted for land sold by the State subsequent to the date of the patent under which the plaintiffs claim title, and which covers part of the land claimed by the defendants. This brings in question the legality of the survey, and the construction of the entry on which it was made, and leads to an examination of the points certified for our determination.

But before we enter on that duty it will be proper to consider the circumstances in which the locator was placed when he made the entry. It was proved in the circuit court, that along this branch there was a very dense canebrake, and the greater part of the land covered by the patent is still a dense canebrake. It was also proved, that a line run parallel with the general course of Mayfield Creek, for twelve miles above the fork, and crossing the branch, at the termination of the 500 poles, from A to B, on the plat, would strike the Mississippi River at F, on the plat, a considerable distance below the corner called for in the patent at the letter C. And it appears by the plat that the creek continues to run nearly the same course for 300 or 400 yards below the fork, and then runs north of northwest for about 300 poles. Now we have a right to infer, from the facts proved, that all the land included in Croghan's patent, and all the river bottom above Mayfield Creek, at the date of the entry, was a dense cane-

brake; because, if an object, permanent in its nature, is proved to exist at the time of the trial, it is fair to infer that it existed at the time the entry was made. *Crotchet v. Greenup*, 4 Bibb, 158. The history and topography of the great valley of the Mississippi proves satisfactorily that where there is a canebrake now there was one sixty years ago; and this fairly induces the belief that the cane upon the rich and alluvion lands is coeval with the oldest trees of the forest. As the locator had the means of ascertaining the course of Mayfield Creek above the fork, where it ran across the high lands, and where there was no cane, it is reasonable to suppose, from the calls of the entry, that he believed that Mayfield Creek, below the fork, ran nearly at right angles to the branch in its general course to the river. And he had a right, from the circumstances, also to believe, that the distance from the fork of the creek to the river was about two miles, when in fact it was less than one mile.

It is obvious from these circumstances, and the calls of the entry, that the locator believed the survey to be made upon it would approach as near to a parallelogram as the irregularity of the two natural boundaries would permit. We are led to the conclusion, * therefore, that these mistakes were all occasioned [* 193] by the impracticability of ascertaining the relative positions of the objects called for, and the courses and distances of the lines necessary to include the quantity of land specified in the entry. But mistakes of this character have been corrected, as far as practicable, by the courts of Kentucky, in giving construction to entries, and particularly in two recent cases like this between military claims and the purchasers from the State. *Rays v. Woods*, and *Daniel, &c. v. Allison*, 2 B. Monroe, 224. Keeping these mistakes in view, we will proceed to give construction to the entry. The call to run from the termination of the base line at B, 500 poles from the fork of the creek at A, and off from the branch towards the Mississippi on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek, to include the quantity, presupposes that a line from the termination of the base line on the branch, parallel with Mayfield Creek, to include the quantity, would terminate before it reached the river, otherwise the locator would have called to run to the river. But it was found, when they made the survey, that the whole area, bounded by the branch, from the termination of the 500 poles, Mayfield Creek to its mouth, and the Mississippi River, down to the letter E, the point where a line running from the termination of the base line, parallel to Mayfield Creek, strikes the river, would include but 887 acres, and when reduced to straight lines, would present a rhom-

boidal figure, with two extremely acute, and two extremely obtuse angles, instead of the figure which must have been in the mind of the locator when he made the entry. We might, therefore, upon the authority of the cases referred to in 2 B. Monroe, sustain the survey on the ground of the mistakes of the locator, evidently made under the influence of causes well calculated to mislead him. But there are other reasons and other authorities upon which this entry and survey may be sustained. It is a well settled rule of construction, that where there are calls in an entry repugnant to each other, those which are inconsistent with the main intention of the locator, manifested by the words of the entry, shall be rejected to give effect to the entry. For example, distance shall prevail over course, where it appears by other calls in the entry the course has been mistaken. *Smith v. Harrow and others*, 1 Bibb, 104. A call to include a natural object will prevail over a mistaken distance called for to reach the object. *Preeble v. Vanhoozer*, 2 Bibb, 18; *McIver v. Walker and another*, 9 Cranch, 173. Testing the entry by these rules, has it been properly surveyed?

Three of the lines are natural and permanent boundaries, except the line on the river, which may be extended in length; the fourth is artificial and movable. It has been already shown that a line from the termination of the line on the branch, at B, to the river at E, and thence up the river to the mouth of Mayfield Creek, will [* 194] not include the quantity of land called for in the entry.

If it is practicable, by a reasonable construction of the entry to give the whole quantity of land called for, it is the duty of the court to give such construction. The mistakes referred to have defeated the intentions of the locator, no doubt, as to the figure of the survey; but, like all prudent locators, he provided, as far as he could, against the influence of such mistakes, by requiring that the two last lines of the survey should be so run as to include the quantity of land called for in the entry. To these two lines he gave course, but gave no specific distance to either, that they might be run long enough to include the quantity. The first of these lines was to run from the termination of the base line at B, "off from the branch towards the Mississippi, on a line parallel to Mayfield Creek," but no specific distance is given, nor is any natural object called for as the termination of this line. Its termination was to be governed, therefore, by the relative positions of the objects previously called for, and the actual distance of the line, on the branch from the river, and by the necessary course and distance that the first and second of these two lines should run to include the quantity; and, therefore, he continues the call by saying, "until a line parallel to the first (the base

line) will strike Mayfield Creek, to include the quantity." The word "until," in grammatical construction, modifies and qualifies the words used to give course and distance; and, in legal construction, the call for course must yield to the call for quantity, the latter being the most important call in the entry.

The great and leading object of every entry is to obtain the quantity of land specified in it; every other call, therefore, must be regarded as intended to effect this principal object, and as subordinate thereto. The call to run a line parallel with the first or base line, is, therefore, repugnant to the call to include the quantity, and must be rejected. Because, if this line had been run parallel with the base line, the quantity of land would not have been included. And, for the same reason, the words "on a line parallel to Mayfield Creek" must be rejected, they being, also, repugnant to the call to include the quantity. The survey has, therefore, in our opinion, been made in conformity with the entry, by running from the mouth of Mayfield Creek, down the river, to the corner at C, that being the distance required to include the quantity; and the line from B, another corner, has been properly run to C, that being the course and distance necessary to close the survey and to include the quantity of land called for in the entry. It is the opinion of this court, therefore, that the circuit court ought to have refused the instruction prayed for by the defendant's counsel.

It is ordered, that if it be certified to the circuit court, that the line from B to C "should be taken and recognized as the true and proper line," and that the instructions prayed by the defendant's counsel ought to be refused.

*M'LEAN, J. "Croghan, assignee, enters 1,000 acres of [*195] land, part of a military warrant, No. 2023, beginning at a fork of Mayfield Creek, about two miles by water above Fort Jefferson, where a branch occasioned by the high waters from the Mississippi runs out of said creek, and at high water empties into the river, at the upper end of the iron banks; from said beginning, 500 poles when reduced to a straight line, and then off from the branch towards the Mississippi, on a line parallel to Mayfield Creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield Creek to include the quantity."

By a statute of Kentucky, passed in 1820, all entries on military warrants west of the Tennessee River are required to be surveyed agreeably to their calls; and any survey and patent which shall cover more land than the entry calls for, is declared to be void as to such surplus. There can be no objection to the validity of this law, as it impairs no right.

Under this statute, the court were requested to give a construction to the entry in question. The prayer was, that the court should instruct the jury, "if they believe from the evidence that the course of Mayfield Creek, from A to D, (the letter A being at the fork of the creek, the beginning of the entry, and the letter D at the mouth of the creek,) is correctly laid down, then the line from B (the termination of the first line of 500 poles) towards the Mississippi, should run parallel to that, or (in other words) to Mayfield Creek, to conform to the entry."

The only dispute is as to the second line, which is to "run from the branch towards the Mississippi, on a line parallel to Mayfield Creek." And this was the instruction prayed for, and which was rejected by the court. Had the instruction been in the very words of the entry, there would not have been a closer conformity with it.

The disputed line was called for by the entry "to run parallel to Mayfield Creek." Now one line to be parallel to another must be equidistant from it. And that was what the instruction asked. From the words of the call in the entry, as to this line, the creek from the forks to the mouth must have been intended, as the line designated could only be parallel to that part of the creek.

The third line called for in the entry was to run from the termination of the line parallel to Mayfield Creek, and "parallel with the first line, so as to strike Mayfield Creek to include the quantity." As this line strikes the creek at the mouth, and runs on the bank of the Mississippi, it cannot be varied to include in the survey the thousand acres called for in the entry. There is a deficiency of one hundred and acres, which covers the land in controversy. And the question is, whether the second line called for in the entry, to run parallel with Mayfield Creek, can be disregarded, and extended so [*196] * as to include the lands of the defendants and the quantity called for in the entry.

In my opinion, this can no more be done than the beginning called for in the entry can be changed, or the first line of the survey. The third line, up the Mississippi was, by the entry, "to strike Mayfield Creek so as to include the quantity."

It is admitted that Mayfield Creek, with its meanders, forms the closing line of the survey. I know of no principle in the land law of Kentucky which authorizes a court to disregard the specific calls of an entry, so as to include the quantity designated. The locator was, no doubt, deceived as to the ground covered by his entry. The line called to be run so as to include the thousand acres being bounded by the Mississippi, could not be varied so as to answer the calls of the entry for quantity. This was the misfortune of the

locator, which is chargeable only on himself. It is clear that he cannot disregard the calls of the entry, on any other line, so as to include the quantity.

The injustice of such a construction to the defendants, seems to me to be clear. Finding the claim of Croghan's entry designating in plain terms its boundaries, and knowing that by the law he was limited to the calls of his entry, his survey not having been made, they purchased the adjacent residuum. And I have no doubt that, by the well established principles of the land law in Kentucky, their title is good, and, therefore, the instruction prayed for should be given.

In *Rays v. Woods*, 2 B. Monr. 222, the court say in reference to this district of country, where a patent has issued, the proof of a variance in the survey from the entry, so as to make the patent void, for the land not included in the entry, devolves on the adversary claimant. But they do not say, in that or in any other case, that where the locator is limited strictly to the calls of his entry, by a subsequent entry, or, as in the present case, by an express statute, that the call for quantity controls the specific calls of the entry. There is no principle better settled in the land law, than that the calls in a survey and patent are not affected by quantity. If no private and paramount right be interfered with, whether the survey and patent contain more or less than the quantity called for, it is equally valid. An entry cannot call for a greater number of acres than is authorized by the warrant on which it is made; but, where the boundaries called for are specific, and the locator is limited strictly to the boundaries of his entry, in making his survey, he can no more disregard them than he can disregard the boundaries called for in his patent.

Palpable mistakes in the entry, such as a call for east instead of west, which is apparent by other calls in the entry, may be corrected. But where there is no mistake or uncertainty in the calls, to vary them is to make a new entry. This, I conceive, no court has *power to do. An entry, like every other instrument [*197] of writing, must be construed by the words used. And these words can never be extended, by construction, so as to infringe upon subsequent and *bond fide* entries.

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JOHN TAYLOR, Junior, and WILLIAM BLACKBURNE AND Co., Claimants of Cloths and Kerseymeres, Plaintiffs in Error, v. THE UNITED STATES, Defendants in Error.

3 H. 197.

Under the collection act of March 2, 1799, (1 Stats. at Large, 627,) every officer of the customs is empowered to make a seizure, in any district.

If the government institute proceedings to enforce a forfeiture, it is wholly immaterial who made the seizure, or whether it was regular or not, or whether the cause assigned for seizing is the same for which a condemnation is sought. 3 Wheat. 246, 16 P. 342, affirmed.

The regularity of the seizure is not in issue upon pleadings addressed to the merits; it requires a plea in abatement to put it in issue.

Persons acting as agents of the government, are witnesses *ex necessitate* as to the facts attending the seizure, and they have no interest in the forfeiture; though interested in obtaining a certificate of probable cause, yet where they act under a search warrant, this interest is too remote to disqualify them, and they are competent to testify on the trial of the merits, the question of probable cause being no part of the issue.

Other invoices, and the conduct of the importers as to other importations, may be admitted for the purpose of showing a scheme to defraud the United States.

Revenue laws, which impose forfeitures for fraud, are not technically penal, so as to call for a strict construction; they should be construed so as effectually to accomplish the intentions of their makers.

Circumstances which may throw the *onus probandi* on the claimants.

Under the 71st section of the collection act of 1799, (1 Stats. at Large, 678,) the judge, and not the jury, determines whether probable cause for the prosecution has been shown.

The 68th section of the collection act of 1799, (1 Stats. at Large, 677) reaches cases, where, by a fraudulent undervaluation, less than the legal amount of duties has been paid, as well as where none have been paid.

THE material facts appear in the opinion of the court, save that it should be stated, in reference to the last point decided, that the goods in question had been entered, and passed through the custom-house, and a duty paid upon them; and, also, that the testimony referred to in the opinion, as in brackets, was as follows:—

[The counsel of the United States, further to prove the issue [*201] on *their parts, offered evidence to prove that William Blackburne and Co. had, in January, 1839, imported certain invoices (no part of the goods seized) into Philadelphia, and had entered them at the custom-house there; that the goods so imported had been appraised above the invoice prices; that the importers had acquiesced in such appraisement, and that Francis Blackburne thereupon stated that he had passed 140 cases at New York at similar prices, and would cease importing goods here; the counsel stating that this was to be followed by evidence to show that he never did import into New York in his own name. All which evidence was objected to by the defendants, but was admitted by the court, to which the defendants then and there excepted; and the said evidence was thereupon given. And the plaintiffs further proved the admission of the defend-

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ant Taylor, that the said mark [B] F was the mark of said defendant Francis Blackburne, and that said Taylor, as the agent of said Blackburne, had paid freight at New York for packages of goods imported there with that mark; and further proved that no importations had been made at that port in the name of said Francis Blackburne, or of said William Blackburne and Co., previously to the summer of 1839, but that large importations had been made there in the name of the claimant, John Taylor, Jr. It was proved that the goods seized had been imported into New York, and entered and passed there, and the duties thereupon paid, but it was no part of the evidence or case of the United States, that there had been any fraud or connivance on the part of the officers of the custom-house of New York with the importers of said goods.]

* *Meredith and Crittenden*, for the plaintiffs in error. [* 204]

Cadwallader and Nelson, (attorney-general,) for the United States.

STORY, J., delivered the opinion of the court.

This is a writ of error to the judgment of the circuit court of the eastern district of Pennsylvania, affirming the judgment of the district court founded upon an information *in rem* against certain cases of cloths and cassimeres seized on land in the said district. The cause was tried by a jury, who returned a verdict for the United States, upon which the judgment was rendered.

The information contained thirteen counts. The 1st and 2d counts were founded on the 50th section of the duty collection act of 1799, c. 128; the 3d count was founded on the 68th *section of the same act; the 4th, 5th, and 10th counts were [* 205] founded on the 66th section of the same act; the 6th, 7th, 8th, 11th, and 12th counts were founded on the 4th section of the act of the 28th of May, 1830, c. 147;¹ and the 9th and 13th counts were founded on the 14th section of the act of the 14th of July, 1832, c. 224.² The claimants put in a plea or answer denying the allegations in the information, upon which an issue was tendered and joined, and tried by the jury.

At the trial, certain exceptions were taken to the matters ruled, and to the charge given by the learned judge who presided at the trial, the form and frame of which exceptions, as propounded by the counsel, we do not propose to examine; and the questions submitted to us arise from the matters of law thus ruled and contained in this charge. With the comments of the learned judge upon the

¹ 4 Stats. at Large, 409.

² Ib. 593.

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evidence, except so far as they involved matters of law, we have nothing to do, as they were submitted solely for the consideration of the jury in weighing the evidence, of which they were the proper and final judges.

In the course of the argument in this court, an objection was insisted on, that the seizure itself, upon which the information is founded, was irregularly and improperly made, it having been made by the collector of the customs of the port of Philadelphia, when it should have been made by the collector of the customs of the port of New York. And some reliance in support of this objection seems to have been placed upon the supposed intention of the 68th section of the duty collection act of 1799, c. 128. But if any reliance could be placed thereon, (as we think it could not,) it would be completely removed by the 70th section of the same act, which makes it the duty of the several officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of that act, or any other act respecting the revenue, as well without as within their respective districts. So that it is plain from this provision that a seizure made by any officer of the customs of any district would be good, although made within any other district. And the whole structure of the act shows that any officer of the customs had a perfect right to seize goods found in his own district, and indeed that it was his appropriate duty.

But the objection itself has no just foundation in law. At the common law, any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified. So that it is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this court in *Gelston v. Hoyt*, 3 Wheat. 246, [* 206] * 310, and in *Wood v. United States*, 16 Pet. 342, 358, 359.

And from these decisions we feel not the slightest inclination to depart.

Indeed, if the objection could under any circumstances be maintainable, it was matter that should have been propounded as preliminary matter in the nature of a plea in abatement of the information, and could constitute no point before the jury upon pleadings addressed to the merits of the case, and involving the direct question of forfeiture or not.

In the course of the trial, several objections to the competency of

certain witnesses, and to the admissibility of certain evidence, offered on behalf of the United States, were taken by the claimants. In the first place, an objection was taken to the competency of John J. Logue, George Gideon, and William Cairns, called to support the issue on behalf of the United States, they being officers of the customs, and the persons who made the seizure of the goods in controversy. By the 71st section of the duty collection act of 1799, c. 128, the *onus probandi* to establish the innocence of the property is thrown upon the claimant in all cases where probable cause is shown for the seizure and prosecution. And by the 89th section of the same act, it is provided that when, in any prosecution on account of a seizure, judgment shall be given for the claimant, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the court shall cause a certificate and entry to be made thereof; and in such case the person making the seizure, or the prosecutor, shall not be liable to any action, suit, or judgment, on account of such seizure and prosecution. The argument, therefore, on behalf of the claimant, is, that these witnesses are incompetent, they being interested in the event of the suit, and being liable to an action at the suit of the claimants, if reasonable cause for the seizure was not established, and that their testimony in effect would conduce to establish such reasonable cause.

Several answers may be given to this objection. In the first place, it is not true that the mere liability of a party to an action in one event of a suit will constitute of itself an absolute or universal objection to his competency. There are many exceptions to the rule on this subject, founded upon necessity, or public policy, or the remoteness, the uncertainty, or the contingent nature of the liability. The present case falls directly within these exceptions. The witnesses were acting as the agents of the government in making the search and seizure; they alone could give testimony as to the facts attending such search and seizure, and were therefore witnesses from necessity; and their acts being adopted or authorized by the government, public policy requires that the government shall have the means of enforcing its own rights through the instrumentality of their testimony. Their competency for such purposes falls directly within the reasoning of the court of king's bench in the case of *The King v. Williams*, 9 Barn. & Cres. 549, and the case of *United States v. * Murphy*, 16 Pet. 203, where the subject was con- [* 207] sidered very much at large.

In the next place, the witnesses were not objectionable in point of competency on account of any interest in the event of the cause. Their interest, if any they had, as informers or otherwise, in the for-

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feiture, was completely removed by the provision of the 91st section of the duty collection act of 1799, c. 128, which, when they are used as witnesses, takes away from them the share of the forfeiture to which they would otherwise be entitled. In the event of the suit, therefore, they had no interest, for the suit was solely to enforce the forfeiture. The question, whether there was probable or reasonable cause for the seizure, constituted no part of the issue to be tried by the jury. So far as it respected throwing the *onus probandi* upon the claimants, it was a matter solely for the consideration of the court in the progress of the trial, and collateral to the main inquiry, although of great importance in regulating the nature and extent and sufficiency of the evidence. And so far as respected the certificate and entry of reasonable cause to protect the seizors from future liability for the seizure, it was no part of the issue, and, indeed, was an act to be done by the court before whom the prosecution was tried, only in case judgment upon the verdict should pass for the claimants; and it therefore was plainly an act to be done and inquiry to be had posterior to the trial.

In the next place, the objection taken was to the competency of the witnesses, as such, for any purposes in the cause. They were not called by the government as witnesses to give evidence of matters showing reasonable or probable cause for the seizure, but as witnesses generally "to support the issue on the part" of the government. If competent for any purpose upon the trial, they could not be rejected generally; and that they were competent to prove "the facts attending the seizure of the goods, and that certain original marks on packages containing the said goods had been erased, and among them the mark [B]F, which was originally upon one of the said packages," cannot, in our judgment, admit of any just doubt. It could make no difference as to their admissibility for these purposes, that collaterally these facts might bear upon the question of probable or reasonable cause or not.

In the next place, there was another and independent ground upon which their competency is clear. It is, that they were acting under a search warrant in making the search and seizure, which would undoubtedly, under the 68th section of the same act, be a complete protection to them against all liability to any suit therefor, unless indeed in a case where the witnesses acted from malice, and also without probable cause; and the absence of either would exonerate them from all liability. So that in this view their liability was remote, contingent, and uncertain.

[* 208] * Upon all these grounds, we are of opinion that the witnesses were clearly admissible.

Another objection was to the admissibility of a bill of lading, entry, and owner's oath, taken on the 16th of July, 1839, in the month preceding the seizure of the goods in question, of nineteen cases of goods (not part of the goods seized) marked [B]F, 1 a 19. Although this evidence was objected to, and it was admitted, yet it does not appear upon the record that any exception was taken to the ruling. But, without dwelling upon this, which was perhaps an accidental omission, it is proper to say, that this evidence was not offered as single, isolated document, (for in that view it might be deemed at most as irrelevant and inconsequential for any purpose,) but it was offered in connection with other documents and evidence to establish a privity between Taylor and Blackburne and Company in other importations of a kindred character, and under a scheme of meditated fraud upon the revenue of the United States, of which these documents were a link in the chain. For this purpose they might be important and necessary; and although the whole evidence is not set forth in the record, yet it is apparent, from what is there found in reference to the next objection, that the evidence had an intimate connection and bearing upon that which is there stated.

The objection here alluded to is in the record stated in the following words: "The counsel of the United States"—[see the paragraph in the statement of the reporter which is included within brackets.] Now, we think the exception to this evidence was properly overruled, and the evidence admissible to establish the connection between Taylor and Blackburne in other importations as well as in the importation of the goods now in controversy, and also to displace any presumption that the acts of the one were not properly to be deemed attributable to any connivance with the other, or that they were not jointly interested in the same scheme of importations, and mutually cognizant of the designs of each other. What effect this evidence ought to have after its admission in the cause, taken in connection with the other evidence, was a matter for the consideration of the jury alone; but of its admissibility for the purposes above stated we entertain no doubt. It is, indeed, a strange omission in the record, that the other evidence in the case is not therein fully stated, nor the points, to which it was adduced, suggested, so that we are left to conjecture from very imperfect materials what was the true extent and bearing of the various matters excepted to as improper evidence.

Another objection is to a question put to Abraham J. Lewis, a witness on behalf of the United States, who, having stated that his firm were importers of cloths and kerseymeres, and that he had thereby a knowledge of their quality, was asked, on cross-examination,

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to state the extent of the importations of his firm; and in reply he said: "Formerly, we imported large quantities of woollens; [* 209] for * three or four years past we have imported but a few packages annually." Whereupon the counsel for the United States, on reëxamination, proposed the following question, namely: "Was there any thing in the state of the market, which caused the alteration which you have mentioned in the amount imported by you within four or five years last past?" to which question the claimants objected; but the judge allowed the question to be put, saying it might have some bearing on the case, and that it was but following out the question put on the cross-examination. We think the decision of the court was perfectly correct, for the reason stated by the judge. The answer might show that the witness had ceased to import so largely, not from want of skill or capital, but for reasons which might connect themselves with the importations of the claimants. What the answer was we do not know; and certainly it could be no just ground of exception, that the answer was such as had no bearing either way upon the merits of the case, and *à fortiori* not, if favorable to the claimants.

Another objection was to the admissibility of the evidence of David Gardner, who was offered to prove that certain goods, marked [B]F, which had been imported into New York, in the ship Eutaw, being the same on which Francis Blackburne was alleged to have paid the freight, were still in the custom-house at New York. We think that this evidence was properly admissible, for the same reasons as those which have been already stated. It was a part of the *res gestæ*. If the other parts of the evidence were favorable to the innocence of the claimants in their various importations, then no conclusion against them could fairly be drawn from this fact. But if, on the other hand, strong circumstances of suspicion of fraud attached to other importations, then the circumstance, so contrary to the usual course of mercantile transactions in cases of perishable articles, or articles liable to depreciation or decay, of their remaining long in the custom-house, might fairly be deemed to inflame those suspicions, especially if, in the interval, the government was on the alert to detect supposed frauds in other importations.

Another objection was to the admission of the evidence of an invoice of merinos, (not part of the goods mentioned in the information,) entered in Philadelphia, by Blackburne and Co. and marked [B]F, 35 to 53, offered as strengthening the evidence of the ownership of packages with this mark. In this view, we can perceive no possible question as to the competency or propriety of the evidence.

Another objection was to the admissibility in evidence of certain invoices of Blackburne, Taylor, Okie, and Robinson, to show the absence of any such usage as to the allowance of five per cent. for measurement, as had been testified to by the witnesses on the part of the claimants. We see no just ground of exception to the admissibility of such evidence. The usage set up was of a general nature, and all evidence which went to establish the want of such generality, by proof of the non-existence of such a deduction in invoices of a similar nature — where, if it was general and well known, it ought to be found — was certainly admissible to rebut the presumptions derived from the adverse proof. The same answer may be given, and indeed applies more forcibly, to the evidence given by Robert Walker, a witness for the claimants, who, upon his cross-examination, verified several invoices of his own importations into the port of New York; and also a letter of one Waite, annexed to one of the invoices. The introduction of this letter was objected to; but it was an accompaniment of the invoice introduced without objection, and it was offered not in chief, but as qualifying and repelling the evidence offered by the claimants as to the five per cent. usage — founded, among that of others, upon the very testimony of Walker. The other invoices verified by Walker were, for the same reason, in our judgment, equally admissible.

We have thus gone over the various objections taken to the competency and admissibility of the testimony in this case; some of which, considering all the circumstances of the case, can scarcely be treated otherwise than as being *inter apices juris*; and shall now proceed to examine the exceptions taken to the charge of the court. Of many of these it is unnecessary to take any special notice, since they have been already disposed of in the case of *Wood v. United States*, 16 Pet. 342, or have incidentally fallen under notice in the preceding parts of this opinion. Upon the point that the revenue laws, on which the information was founded, were not, as the judge in the court below suggested, to be deemed penal laws in the sense in which that phrase is sometimes used, it may be proper to say a very few words. He treated the point as not of great importance in the case, as we think it was not, since it had no tendency to change the interpretation of the provisions of the revenue laws then under his consideration. In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was therefore strictly accurate, when he stated that “it must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to

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be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." And he added: "It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them." The same distinction will be found recognized in the elementary writers, as, for example, in Blackstone's Commentaries, (1 Black. Comm. 88;) and Bacon's Abridgment, (statute I. 7, 8;) and Comyn's Digest, (Parliament [* 211] R. * 13, R. 19, R. 20;) and it is also abundantly supported by the authorities.

The main exception, however, to the charge is as to the ruling of the judge, that there was probable cause of seizure, and that, therefore, the *onus probandi* to establish the innocence of the importation, and to repel the supposed forfeiture, was upon the claimants. We entirely concur in the opinion of the judge, in his views of the evidence as applicable to this point. He, and not the jury, was to judge whether there was probable cause or not to throw the *onus probandi* on the claimants; for the 71st section of the act of 1799, c. 128, expressly declares, that "the *onus probandi* shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom such prosecution is to be had." In our judgment, the circumstances were abundantly sufficient to justify him, nay, to require him to throw the *onus probandi* on the claimants. The extraordinary circumstances connected with the concealment of the goods, the prevarications and false statements of Blackburne, and the undervaluation of the goods, all required the most plenary proofs on the part of the claimants, to deliver the property from the perils by which it was surrounded. The original cost of the purchases could have been fully proved by the claimants, if the transactions were *bonâ fide* purchases; and they had the most ample means within their power to establish it. Taylor and Blackburne were so completely mixed up in these transactions, as principals and agents, or as joint principals, that the acts of the one might most justly be attributed to the other; and in fact they admit of no reasonable separation as to design or privity of coöperation.

There is but one other exception remaining, which requires any special notice. It is, whether the 68th section of the act of 1799, c. 128, was intended to reach, or does reach, cases where, by a false and fraudulent undervaluation, less than the amount of duties required by law has been paid, or whether it applies only to cases where no duties at all have been paid upon the goods. In our

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opinion, the section was designed to apply equally to both cases. In the sense of that section, all goods are forfeited on which, by fraud, all the duties shall not have been paid, or secured to be paid which are by law required to be paid or secured thereon.

Upon the whole, the judgment of the circuit court is affirmed.

4 H. 242, 251, 327; 17 H. 85; 8 Wal. 114, 145.

JOHN POLLARD *et al.*, Lessee, Plaintiffs in Error, v. JOHN HAGAN *et al.*, Defendants in Error.

3 H. 212.

The State of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters within the limits of the State, not previously granted. The effect of the ordinance of 1787 discussed.

The case is stated in the opinion of the court.

Coxe, for the plaintiff.

Sergeant, contra.

* M'KINLEY, J., delivered the opinion of the court. [* 219]

This case comes before this court upon a writ of error to the supreme court of Alabama.

An action of ejectment was brought by the plaintiffs against the defendants, in the circuit court of Mobile county, in said State; and upon the trial, to support their action, "the plaintiffs read in evidence a patent from the United States for the premises in question, and an act of congress passed the 2d¹ day of July, 1836, confirming to them the premises in the patent mentioned, together with an act of congress passed the 26th of May, 1824.² The premises in question were admitted by the defendants to be comprehended within the patent; and there was likewise an admission by both parties that the land lay between Church street and North Boundary street, in the city of Mobile; and there the plaintiffs rested their case."

* "The defendants, to maintain the issue on their part, [* 220] introduced a witness to prove that the premises in question, between the years 1819 and 1823, were covered by water of the Mobile River at common high tide;" to which evidence the plaintiffs by their counsel objected; but the court overruled the objection, and permitted the evidence to go to the jury. "It was also in proof, on

¹ 6 Stats. at Large, 680.

² 4 Ib. 66.

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the part of the defendant, that at the date of the Spanish grant to Panton, Leslie, and Co., under which they claim, the waters of the Mobile Bay, at high tide, flowed over what is now Water street, and over about one third of the lot west of Water street, conveyed by the Spanish grant to Panton, Leslie, and Co.; and that the waters continued to overflow Water street, and the premises sued for, during all the time up to 1822 or 1823; to all which admissions of evidence, on part of the defendants, the plaintiffs excepted." "The court charged the jury, that if they believed the premises sued for were below usual high-water mark, at the time Alabama was admitted into the Union, then the act of congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labor of man only, or by alluvion; to which the plaintiffs excepted. Whereupon a verdict and judgment were rendered in favor of the defendants, and which judgment was afterwards affirmed by the supreme court of the State."

This question has been heretofore raised, before this court, in cases from the same State, but they went off upon other points. As now presented, it is the only question necessary to the decision of the case before us, and must, therefore, be decided. And we now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the state governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous well considered decisions of this court, to which we shall have occasion to refer in the course of this investigation.

The counsel for the plaintiffs insisted, in argument, that the United States derived title to that part of Alabama, in which the land in controversy lies, from the king of Spain; and that they succeeded to all his rights, powers, and jurisdiction over the territory ceded, and therefore hold the land and soil, under navigable waters, according to the laws and usages of Spain; and by those laws and usages the rights of a subject to land derived from the crown could not extend beyond high-water mark, or navigable waters, without an express grant; and that all alluvion belonged to the crown, and might be granted by this king, together with all land between high water and the channel of such navigable waters; and by the

[* 221] compact between the United States and Alabama, on * her admission into the Union, it was agreed that the people of Alabama forever disclaimed all right or title to the waste or unap-

propriated lands lying within the State, and that the same should remain at the sole disposal of the United States; and that all the navigable waters within the State should forever remain public highways, and free to the citizens of that State and the United States, without any tax, duty, or impost, or toll therefor, imposed by that State. That by these articles of the compact, the land under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and to give any other construction to these compacts, would be to yield up to Alabama, and the other new States, all the public lands within their limits.

We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803,¹ ceding Louisiana.

All that part of Alabama, which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the State of Georgia to the United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virginia to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory northwest of the River Ohio. Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bonâ fide* disposed of for that purpose, and for no other use or purpose whatever. And the statute passed by Virginia, authorizing her delegates to execute this deed, and which is recited in it, authorizes them, in behalf of the State, by a proper deed to convey to the United States, for the benefit of said States, all the right, title, and claim, as well of soil as jurisdiction, "upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit; and that the States so formed shall be republican States, and admitted members of the federal Union, having the same rights of sovereignty, freedom, and independence, as the other States." And the delegates conclude the deed thus:

¹ 8 Stats. at Large, 200.

“ Now know ye, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, by virtue of the [* 222] * power and authority committed to us by the act of the said general assembly of Virginia before recited, and in the name, and for and on behalf of the said commonwealth, do, by these presents, convey, transfer, assign, and make over unto the United States in congress assembled, for the benefit of said States, Virginia inclusive, all right, title, and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the River Ohio, to and for the uses and purposes, and on the conditions of the said recited act.”

And in the deed of cession, by Georgia, it is expressly stipulated, “ That the territory thus ceded shall form a State and be admitted as such into the Union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period, if congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of congress of the 13th day of July, 1787, for the government of the northwestern territory of the United States, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery.” The manner in which the new States were to be admitted into the Union, according to the ordinance of 1787, as expressed therein, is as follows: “ And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the congress of the United States, on an equal footing with the original States in all respects whatever.” Thus it appears that the stipulations, trusts, and conditions are substantially the same in both of these deeds of cession; and the acts of congress, and of the state legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception, however,—the cession made by Virginia was before the adoption of the constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the States of Virginia and Georgia, and their deeds of cession to the United States, and giving to each separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and

duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to "the same extent, in all respects, [* 223] that it was held by the States ceding the territories.

The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. *Vat. Law of Nations*, § 244. This definition shows that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. The compact made between the United States and the State of Georgia, was sanctioned by the constitution of the United States; by the 3d section of the fourth article of which it is declared, that "new States may be admitted by the congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of congress."

When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

By the sixteenth clause of the 8th section of the first article of the constitution, power is given to congress "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of congress, become the seat of government of the United

States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases [* 224] already * mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new State, to exercise all the powers of government, which belong to, and may be exercised by the original States of the Union, must be admitted, and remain unquestioned, except so far as they are temporarily deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old States, of their waste and unappropriated lands, to the United States, under a resolution of the old congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession was, to convert the land into money, for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, throughout their respective borders, and they and the original States will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose. The provision of the constitution above referred to, shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument, so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new States, "that they forever disclaim all right and title to the

waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as a law. Full power is given to congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

And all constitutional laws are binding on the people, in the new States and the old ones, whether they consent to be bound by them or not. Every constitutional act of congress is passed by the will of the people of the United States, expressed through their representatives, *on the subject-matter of the enactment; [*225] and when so passed, it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever State or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new State where it may happen to be, contains its own refutation, and requires no further examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that territory, amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on congress to pass the act granting to the plaintiffs the land in controversy.

And this brings us to the examination of the question, whether Alabama is entitled to the shores of the navigable waters, and the soils under them, within her limits. The principal argument relied on against this right, is, that the United States acquired the land in controversy from the king of Spain. Although there was no direct reference to any particular treaty, we presume the treaty of the 22d of February, 1819,¹ signed at Washington, was the one relied on, and shall so consider the argument. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the king of Spain; and as, by the laws and usages of Spain, the king had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the

¹ 8 Stat. at Large, 252

land in controversy, and thereby the plaintiffs acquired a complete title.

If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. *Vat. Law of Nations*, b. 1, c. 19, §§ 210, 244, 245, and b. 2, c. 7, § 80.

The United States have never claimed any part of the territory included in the States of Mississippi or Alabama, under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those States. By the treaty between the United States and Spain, signed at San Lorenzo el Real, on the 27th of October, 1795,¹ "the high contracting parties declare and agree, that the line between the United States and East and

West Florida, shall be designated by a line, beginning on [* 226] the River * Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the Chatahouchee River," &c. This treaty declares and agrees that the line which was described in the treaty of peace between Great Britain and the United States, as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States.

Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants, a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States would not have refused. But, instead of requiring an article to this effect, she expressly stipulated to withdraw the settlements then within what the treaty admits to be the territory of the United States, and for permission to the settlers to take their property with them. "We think this an unequivocal acknowledgment that the occupation of the territory by Spain was wrongful, and we think the opinion thus clearly indicated was supported by the state of facts. It follows that Span-

¹ 8 *Stats. at Large*, 138.

ish grants made after the treaty of peace, can have no intrinsic validity." *Henderson v. Poindexter*, 12 Wheat. 535.

Previous to the cession made by Georgia, the United States, by the act of congress of the 7th of April, 1798,¹ had established the Mississippi territory, including the territory west of the Chatahouchee River, to the Mississippi River, above the 31st degree of north latitude, and below the Yazous River, subject to the claim of Georgia to any portion of the territory. And the territory thus erected, was subjected to the ordinance of the 13th of July, 1787, for its government, that part of it excepted which prohibited slavery. 1 Story's Laws, 494. And by the act of the 1st of March, 1817,² having first obtained consent of Georgia to make two States instead of one within the ceded territory, congress authorized the inhabitants of the western part of the Mississippi territory, to form for themselves a constitution and state government, "to consist of all the territory included within the following boundaries, to wit: Beginning on the River Mississippi, at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of Washington county; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the junction of Pearl River with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along said degree of latitude to the Mississippi River; thence up the same to the beginning." 3 Story's Laws, 1620. * And [* 227] on the 3d of March, 1817, congress passed an act³ declaring, "that all that part of the Mississippi territory, which lies within the following boundaries, to wit: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido River; thence east to the western boundary line of the State of Georgia; thence along said line to the southern boundary line of the State of Tennessee; thence west, along said boundary line, to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of Washington county; thence due south to the Gulf of Mexico; thence eastwardly, including all the islands within six leagues of the shore to the Perdido River; thence up the same to the beginning; shall, for the purposes of temporary government, constitute a separate territory, and be called Alabama."

And by the 2d section of the same act it is enacted: "That all

¹ 1 Stats. at Large, 549

² 3 Ib. 348.

³ Ib. 371.

offices which exist, and all laws which may be in force when this act shall go into effect, shall continue to exist and be in force until otherwise provided by law." 3 Story's Laws, 1634, 1635. And by the 2d article of the compact contained in the ordinance of 1787, which was then in force in the Mississippi territory, among other things, it was provided, that "the inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury, and of judicial proceedings according to the course of the common law." And by the proviso to the 5th section of the act of the 2d of March, 1819,¹ authorizing the people of the Alabama territory to form a constitution and state government, it is enacted: "That the constitution, when formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the States and the people of the territory northwest of the Ohio River, so far as the same has been extended to the said territory [of Alabama] by the articles of agreement between the United States and the State of Georgia. By these successive acts on the part of the United States, the common law has been extended to all the territory within the limits of the State of Alabama, and therefore excluded all other law, Spanish or French.

It was after the date of the treaty of the 22d of February, 1819, between the United States and Spain, but before its ratification, the people of the Alabama territory were authorized to form a constitution; and the State was admitted into the Union, according to the boundaries established when the country was erected into a territorial government. But the United States have never admitted that they derived title from the Spanish government to any portion of the territory included within the limits of Alabama. Whatever claim Spain may have asserted to the territory above the 31st degree of north latitude prior to the treaty of the 27th of October, 1795, was abandoned by that treaty, as has been already shown. We will now

inquire whether she had any right to territory below the [*228] *31st degree of north latitude, after the treaty between

France and the United States, signed at Paris on the 30th of April, 1803, by which Louisiana was ceded to the United States. The legislative and executive departments of the government have constantly asserted the right of the United States to this portion of the territory under the 1st article of this treaty; and a series of measures intended to maintain the right have been adopted. Mobile was taken possession of, and erected into a collection district, by act² of the 24th of February, 1804, c. 13, (2 Story's Laws, 914.) In the year

¹ 3 Stats. at Large, 489.

² 9 Ib. 251.

1810, the President issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far as the Perdido, and hold it for the United States. In April, 1812, congress passed an act to enlarge the limits of Louisiana.¹ This act includes part of the country claimed by Spain as West Florida. And in February, 1813,² the President was authorized to occupy and hold all that tract of country called West Florida which lies west of the River Perdido, not then in the possession of the United States. And these measures having been followed by the erection of Mississippi territory into a State,³ and the erection of Alabama into a territory, and afterwards into a State,⁴ in the year 1819, and extending them both over this territory, could it be doubted that these measures were intended as an assertion of the title of the United States to this country?

In the case of *Foster and Elam v. Neilson*, 2 Pet. 253, the right of the United States to this country underwent a very able and thorough investigation. And Chief Justice Marshall, in delivering the opinion of the court, said: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied." The chief justice then discusses the validity of the grant made by the Spanish government after the ratification of the treaty between the United States and France, and it is finally rejected on the ground that the country belonged to the United States and not to Spain when the grant was made. The same doctrine was maintained by this court in the case of *Garcia v. Lee*, 12 Pet. 511. These cases establish, beyond controversy, the right of the United States to the whole of this territory under the treaty with France.

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, *to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the

¹ 2 *Stata. at Large*, 708.² 3 *Ib.* 472.³ 3 *Ib.* 472.⁴ 3 *Ib.* 608.

Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin and others v. Waddell*, 16 Pet. 410, the present chief justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State," would be void if inconsistent with the constitution of the United States. But is this provision repugnant to the constitution? By the 8th section of the 1st article of the constitution, power is granted to congress "to regulate commerce with foreign nations, and among the several States." If, in the exercise of this power, congress can impose the same restrictions upon the original States, in relation to their navigable waters, as are imposed by this article of the compact on the State of Alabama, then this article is a mere regulation of commerce among the several States, according to the constitution, and, therefore, as binding on the other States as Alabama.

In the case of *Gibbons v. Ogden*, 9 Wheat. 196, after examining the preliminary questions respecting the regulation of commerce with foreign nations and among the States, as connected with the subject-matter there in controversy, Chief Justice Marshall said: "We are now arrived at the inquiry, What is this power? It is the power to regulate, that is, to prescribe, the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case. If, as has been always understood, the sovereignty of congress, though limited to specified objects,

is plenary as to those objects, the power over commerce *with foreign nations, and among the several States, is [*230] vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." As the provision of what is called the compact between the United States and the State of Alabama does not, by the above reasoning, exceed the power thereby conceded to congress over the original States on the same subject, no power or right was, by the compact, intended to be reserved by the United States, nor to be granted to them by Alabama.

This supposed compact is, therefore, nothing more than a regulation of commerce to that extent among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States, "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the States respectively. Secondly. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly. The right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the supreme court of the State of Alabama is, therefore, affirmed.

CATRON, J., dissented.

The statute of 1836, and the patent of the United States founded on it, by which the land in controversy was granted to William Pollard's heirs, have, on several occasions heretofore, received the sanction of this court as a valid title.

1. In the cause of Pollard's Heirs v. Kibbe, 14 Pet. 353, [*231] the *supreme court of Alabama having pronounced an opposing claim under the act of 1824 superior to Pollard's, this court reversed the judgment, and established the latter, after the most mature consideration.

2. In the case of Pollard v. Files, 2 How. 591, the precise title was again brought before this court, and very maturely considered; it was then said (page 602): "This court held, when Pollard's title was before it formerly, that congress had the power to grant the land to him by the act of 1836; on this point there was no difference of opinion at that time among the judges. The difference to which the supreme court of Alabama refers, (in its opinion in the record,) grew out of the construction given by a majority of the court to the act of 1824, by which the vacant lands east of Water street were granted to the city of Mobile."

On this occasion, the decision of the supreme court of Alabama was again reversed, and Pollard's heirs ordered to be put into possession, and they now maintain it under our two judgments. It is here for the third time.

In the mean time, between 1840 and 1844, a doctrine had sprung up in the courts of Alabama, (previously unheard of in any court of justice in this country, so far as I know,) assuming that all lands temporarily flowed with tide water were part of the eminent domain and a sovereign right in the old States; and that the new ones when admitted into the Union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of state sovereignty, and thereby defeated the title of the United States, acquired either by the treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the courts, it was not entirely so in the political discussions of the country; there it had been asserted, that the new States coming in, with equal rights appertaining to the old ones, took the high lands as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a

State. Louisiana was admitted in 1812;¹ to her the same rules must apply that do to Alabama. All acquainted with the surface of the latter know that many of the most productive lands there, and now in successful cultivation, were in 1812 subject to overflow, and have since been reclaimed by levees.

It is impossible to deal with the question before us understandingly, without reference to the physical geography of the delta of the Mississippi and the country around the Gulf of Mexico, where the most valuable lands have been made and are now forming by alluvion deposits of the floating soils brought down by the great rivers; the * earlier of which had become dry lands; but the [* 232] more recent were flowed, when we acquired the country; and are in great part yet so; thus situated they have been purchased from the United States and reclaimed; a process that is now in daily exercise. An assumption that mud-flats and swamps once flowed, but long since reclaimed, had passed to the new States, on the theory of sovereign rights, did, at the first, strike my mind as a startling novelty; nor have I been enabled to relieve myself from the impression owing to the fact in some degree, it is admitted, that for thirty years neither congress, nor any state legislature, has called in question the power of the United States to grant the flowed lands, more than others; the origin of title, and its continuance, as to either class, being deemed the same. A right so obscure, and which has lain dormant, and even unsuspected, for so many years, and the assertion of which will strip so much city property, and so many estates of all title, should as I think be concluded by long acquiescence, and especially in courts of justice.

Again: the question before us is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of property is a mere incident. In such a case, where there is doubt, and a conflict suggested, the political departments, state and federal, should settle the matter by legislation; by this means private owners could be provided for and confusion avoided; but no State complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States, or by their agents, in the execution of the great trust imposed on the latter to dispose of the public domain for the common benefit; on the contrary, we are called on by a mere trespasser in the midst of a city, to assert and maintain this sovereign right for his individual protection, in sanction of the trespass.

But as already stated, the United States may be an owner of prop-

¹ 8 Stats. at Large, 701.

erty in a State, as well as another State, or a private corporation, or an individual may: That the proprietary interest is large, cannot alter the principle. I admit if the agents of the United States obstruct navigation, the state authorities may remove the obstructions and punish the offenders; so the States have done for many years, without inconvenience or complaint.

Nor can material inconvenience result. If a front to a city, or land for another purpose is needed, congress can be applied to for a grant as was done by the corporation of Mobile in 1824; if the State where the land lies was the owner, the same course would have to be pursued. The States and the United States are not in hostility; the people of the one are also the people of the other; justice and donation is alike due from each.

Connecticut was once a large proprietor in the Northwest Territory, (now Ohio.) She owned the shores of a great lake and the banks of navigable rivers. Can it be assumed that the ad-
[* 233] mission of * Ohio defeated the title of Connecticut, and that she could not grant? The question will not bear discussion; and how can the case put be distinguished from the one before us. Nay, how can either be distinguished from the rights of private owners of lands above water, or under the water? Yet in either instance, is the owner in fee deprived of his property, on this assumption of sovereign rights?

The front of the city of Mobile is claimed by the act of 1824, sanctioned by this court as a valid grant in the five cases of *Pollard v. Kibbe*, 14 Pet. 353; of *The City of Mobile v. Eslava*, 16 Pet. 234; of the same plaintiff *v. Hallet*, 16 Pet. 261; of the same plaintiff *v. Emanuel*, 1 How. 95, and of *Pollard v. Files*, 2 How. 591. Except the grant to Pollard, the act of 1824 confers the entire title, (so far as is known to this court,) of a most valuable portion, and a very large portion, of the second city on the Gulf of Mexico, in wealth and population. This act is declared void in the present cause; and the previous decisions of this court are either directly, or in effect, overthrown, and the private owners stripped of all title. On this latter point my brethren and I fully agree. Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this State, Louisiana, Mississippi, and surely Florida, will of necessity have to adopt some system of giving title if it is possible to do so, aside from private legislation; as the flowed lands are too extensive and valuable for the latter mode of grant in all instances.

The charge of the state court to the jury was, that the act of congress of 1836, and the patent founded on it, and also, of course, the

act of 1824, were void, if the lands granted by them were flowed at high tide when Alabama was admitted; and it was immaterial whether the mud-flat had been filled up and the water excluded by the labor of man or by natural alluvion. And this charge is declared to have been proper, by a majority of this court.

The decision founds itself on the right of navigation, and of police connected with navigation. As a practical truth, the mud-flats and other alluvion lands in the delta of the River Mississippi, and around the Gulf of Mexico, formed of rich deposits, have no connection with navigation, but obstruct it, and must be reclaimed for its furtherance. This is well illustrated by the recent history of Mobile. When the act of 1824 was passed, granting to the corporation the front of the city, it was excluded from the navigable channel of the river by a mud-flat, slightly covered with water at high tide, of perhaps a thousand feet wide. This had to be filled up before the city could prosper, and of course by individual enterprise, as the vacant space, as was apparent, must become city property; and it is now formed into squares and streets, having wharves and warehouses. The squares are built up; and the fact that that part of the city stands on land once subject to the flow of tide, will soon be matter of history. At New Orleans, and at most other places fronting rivers
* where the tide ebbs and flows, as well as on the ocean and [*234] great lakes, navigation is facilitated by similar means; without their employment few city fronts could be formed, at all accommodated to navigation and trade. To this end private ownership is indispensable and universal; and some one must make title. If the United States have no power to do so, who has? I repeat, can Alabama grant the soil? She disavowed all claim and title to and in it, as a condition on which congress admitted her into the Union. By the act of March 2, 1819, (3 Story's Laws, 1726,) the Alabama territory was authorized to call a convention, and form a state constitution; but congress imposed various restrictions, and among others the following one: "And provided always, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States."

On the 2d of August, 1819, the convention of Alabama formed a constitution, and adopted an ordinance declaring "that this convention, for and on behalf of the people inhabiting this State, do ordain, agree, and declare, that they forever disclaim all right and

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title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States." In addition, all the propositions offered by the act of March 2, 1819, were generally accepted without reservation.

On the 14th of December, 1819, congress, by resolution, admitted Alabama as a State, on the conditions above set forth. 3 Story's Laws U. S. 1804.

That the lands in contest, and granted by the acts of 1824 and 1836, were of the description of "waste or unappropriated," and subject to the disposition of the United States, when the act of congress of the 2d of March, 1819, was passed, is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government; and this in regard to any lands that could be granted. And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a State to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the State, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles. It follows, that if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist. And to this conclusion,

as I understand the reasoning of the principal opinion, the [* 235] * doctrine of a majority of my brethren mainly tends. The assumption is, that flowed lands, including mud-flats, extending to navigable waters, appertain to such waters, and are clothed with a sovereign political right in the State; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction; and being part of state sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of the United States are declared void; conceding to the theory all the plenitude it can claim, still, Alabama has only political jurisdiction over the thing; and it must be admitted that jurisdiction cannot be the subject of a private grant.

The present question was first brought directly before this court, (as I then supposed, and now do,) in the cause of *The City of Mobile v. Eslava*, in 1840, when my opinion was expressed on it at some length. It will be found in 16 Pet. 247, and was in answer to the opinion of the supreme court of Alabama, sent up as part of the record; having been filed pursuant to the statute of that State, found

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in Clay's Digest, 286, § 6. My opinion, then given, has been carefully examined, and, so far as it goes, is deemed correct, (except some errors of the press,) nor will the reasons given be repeated.

In Hallet's case, 16 Pet. 263, reasons were added to the former opinion. And again, in the case of Emanuel, the question is referred to, in an opinion found in 1 How. 101.

In Pollard's Lessee v. Files, 2 How. 602, the question, whether congress had power to grant the land now in controversy was treated as settled. As the judgment was exclusively founded on the act of 1836, (the plaintiff having adduced no other title,) it was impossible to reverse the judgment of the supreme court of Alabama on any other assumption than that the act of congress conferred a valid title. I delivered that opinion, and it is due to myself to say, that it was the unanimous judgment of the members of the court then present.

I have expressed these views in addition to those formerly given, because this is deemed one of the most important controversies ever brought before this court on any title, either as it respects the amount of property involved, or the principles on which the present judgment proceeds, principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

9 H. 471; 10 H. 82; 18 H. 26, 518; 18 H. 71; 19 H. 898; 20 H. 84; 8 Wal. 718;
6 Wal. 428.

WILLIAM F. CARY and SAMUEL T. CARY, Plaintiffs, v. EDWARD CURTIS.

8 H. 236.

The effect of the second section of the act of March 3, 1839, (5 Stats. at Large, 348,) is, that an action cannot be maintained against a collector of customs to recover back money illegally exacted by him as, and for, duties, although paid under protest.

CERTIFICATE of division of opinion by the judges of the circuit court of the United States for the southern district of New York, upon the question whether the act of March 3, 1839, § 2, (5 Stats. at Large, 348,) was a bar to an action against a collector of customs, for moneys illegally exacted by him, as, and for, duties, and paid under protest, the collector having paid them into the treasury before action brought.

George Sullivan, for the plaintiff.

Nelson, (attorney-general,) *contra*.

* DANIEL, J., delivered the opinion of the court.

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In order to arrive at the answer, which should be given to the question certified upon this record, the objects first to be sought for are the intention and meaning of congress in the enactment of the 2d section of the act of March 3, 1839, under which the question sent here has been raised. The positive language of the statute, it is true, must control every other rule of interpretation, yet even this may be better understood by recurrence to the known public practice as to matters in *pari materia*, and by the rules of law as previously expounded by the courts, and as applied to and as having influenced that practice. The law as laid down by this court with [* 240] * respect to collectors of the revenue, in the case of *Elliott v. Swartwout*, 10 Pet. 137, and again incidentally in the case of *Bend v. Hoyt*, 13 Pet. 263, is precisely that which is applicable to agents in private transactions between man and man, namely, that a voluntary payment to an agent without notice of objection, will not subject the agent who shall have paid over to his principal; but that payment, with notice, or with a protest against the legality of the demand, may create a liability on the part of the agent who shall pay over to his principal in despite of such notice or protest. Such was the law as announced from this court, and congress must be presumed to have been cognizant of its existence; and as the peculiar power ordained by the constitution to prescribe rules of right and of action for all officers as well as others falling within the legitimate scope of federal legislation, they must be supposed to have been equally cognizant of the effects and tendencies of this court's decisions upon the collection of the public revenue. With this knowledge necessarily presumed for them, congress enact the 2d section of the act of 1839. It should not be overlooked, for it is very material in seeking for the views of congress in this enactment, that the court, in the case of *Elliott v. Swartwout*, in its reasoning upon the second point submitted to them, say, that the claimant, by giving notice to the collector, would "put him on his guard," by requiring him not to pay over the money. They further say, that the collector would, by the same means, be placed in a situation to claim an indemnity. The precise mode in which this protection of the collector was to be accomplished, or his indemnity secured, it is true, the court have not explicitly declared; but it is thought to be no forced construction of their language to explain it as sanctioning a right of retainer in the collector of the funds received by him for the government; for what shield so effectual could he interpose between himself and the cost and hazards of frequent litigation? Indeed, this would appear, according to the opinion of the court, that very

protection which justice and necessity would equally warrant. In practice, this retainer has, with or without warrant, been resorted to.

And now let us look to the language of the act of 1839, c. 82, § 2. "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the treasury department, to be placed to the credit of the treasurer, kept and disposed of; and it shall not be held by said collector or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the secretary of the * treasury, that in any case of unascertained duties, or duties [*241] paid under protest, more money has been paid to the collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated." What is the plain and obvious import of this provision, taking it independently and as a whole? It is, that all moneys thereafter paid to any collector for unascertained duties, or duties paid under protest, (i. e. with notice of objection by the payer,) shall, notwithstanding such notice, be placed to the credit of the treasurer, kept and disposed of as all other money paid for duties is required by law to be kept and disposed of; that is, they shall be paid over by the collector, received by the treasurer, and disbursed by him in conformity with appropriations by law, precisely as if no notice or protest had been given or made; and shall not be retained by the collector (and consequently not withdrawn from the uses of the government) to await any ascertainment of duties, or the result of any litigation relative to the rate or amount of duties, in any case in which money is so paid.

This section of the act of congress, considered independently and as apart from the facts and circumstances which are known to have preceded it, and may fairly be supposed to have induced its enactment, must be understood as leaving with the collector no lien upon, or discretion over, the sums received by him on account of the duties described therein; but as converting him into the mere bearer of those sums to the treasury of the United States, through the presid-

ing officer of which department they were to be disposed of in conformity with the law. Looking, then, to the immediate operation of this section upon the conclusions either directly announced or as implied in the decision of *Elliott v. Swartwout*, how are those conclusions affected by it? They must be influenced by consequences like the following: That whereas by the decision above mentioned, it is assumed that, by notice to the collector, or by protest against payment, a personal liability for the duties actually paid, attaches upon, and that for his protection a correspondent right of retainer is created on his part; it is thereby made known (i. e. by the statute) that under no circumstances in future should the revenue be retained in the hands of the collector; that he should, in no instance, be regarded by those making payments to him as having a lien upon it, because he is announced to be the mere instrument or vehicle to convey the duties paid into his hands into the treasury; that it is the secretary of the treasury alone in whom the rights of the government and of the claimant are to be tested; and that whosoever shall pay to a collector any money for duties, must do so subject to the consequences herein declared. Such, from the 3d day of March, 1839,

was the public law of the United States; it operated as [*242] *notice to every one; it applied, of course, to every citizen as well as to officers concerned in the regulations of the revenue; and as it removed the implications on which the decision of *Elliott v. Swartwout* materially rested, that case cannot correctly control a question arising under a different state of the law, and under a condition of the parties also essentially different.

It will not be irrelevant here to advert to other obvious and cogent reasons by which congress may have been impelled to the enactment in question; reasons which, it is thought, will aid in furnishing a solution of their object. Uniformity of imposts and excises is required by the constitution. Regularity and certainty in the payment of the revenue must be admitted by every one as of primary importance; they may be said almost to constitute the basis of good faith in the transactions of the government; to be essential to its practical existence. Within the extended limits of this country are numerous collection districts; many officers must be intrusted with the collection of the revenue; and persons much more numerous, with every variety of interest and purpose, are daily required to make payments at the ports of entry. To permit the receipts at the customs to depend on constructions as numerous as are the agents employed, as various as might be the designs of those who are interested; or to require that those receipts shall await a settlement of every dispute or objection that might spring from so many conflicting views, would be greatly

to disturb, if not to prevent, the uniformity prescribed by the constitution, and by the same means to withhold from the government the means of fulfilling its important engagements. In the view of mischiefs so serious, and with the intention of preventing or remedying them, nothing would seem more probable or more reasonable, we might add more necessary, than that the government should endeavor to devise a plan by which, as far as practicable, to retain its fiscal operations within its own control, thereby insuring that uniformity in practice enjoined by the theory of the constitution, and that punctuality which is indispensable to the benefit of all. Such a plan has congress devised in the act in question. We have no doubts of the objects or the import of that act; we cannot doubt that it constitutes the secretary of the treasury the source whence instructions are to flow; that it controls both the position and the conduct of collectors of the revenue; that it has denied to them every right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the treasury department the tribunal for the examination of claims for duties said to have been improperly paid.

It has been urged that the clause of the act of 1839, declaring that the money received shall not be held by any collector to await any ascertainment of duties, or the result of any litigation in relation * to the rate or amount of duties legally chargeable [* 243] and collectable in any case where money is so paid, shows that congress did not mean to deprive the party of his action of *assumpsit* against the collector; that litigation of that description was still contemplated, and that the only object of the law was to place the money in dispute in the possession of the treasurer, to await a decision, instead of leaving it in the hands of the collector. The court cannot assent to this construction. It will be remembered that the two principal cases in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is a matter of history that the alleged right to retain on these two accounts, had led to great abuses, and to much loss to the public; and it is to these two subjects, therefore, that the act of congress particularly addresses itself. It begins by declaring that all money received on these accounts, shall be paid into the treasury; and then, in order to show that the collector is not the person with whom any claims for this money are to be adjusted, or who is to be held responsible for it, the act proceeds to declare that the money shall not remain in his hands, even if the protest is followed by a

suit; that, notwithstanding suit may be brought against him, he shall still pay the money into the treasury, and that the controversy shall be adjusted with the secretary. Congress supposed, probably, that a party might choose to sue the collector, as has been done in this instance; but it does not by any means follow that it was intended to make him liable in the suit, or to give the party the right of recovery against him. The words used go to show, that neither a protest which is mentioned in the first part of the section, nor a suit which is mentioned in the clause of which we are speaking, shall be a pretext or excuse for retaining the money. Suppose the words in relation to a litigation had been omitted, and the law had said, that the collector should not retain the money for any ascertainment of duties, but that the secretary of the treasury in that case, as well as in the case of duties paid under protest, should adjust the claim and pay what was really due. The omission supposed would have strongly implied that, if there was litigation, he might retain, and it might be said with much show of reason, that by forbidding him to retain for unascertained duties, but not forbidding him to retain in case of litigation for duties paid under protest, implied that he could not retain for the former, but might for the latter. We hold it not a logical mode of reasoning where the omission of words would evidently lead to a particular conclusion, to argue that their insertion can do the same thing. Besides, the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for overpayments of unascertained duties. If these words were intended to sanction suits against collectors for the former, why are litigations for the latter not [* 244] * also countenanced? Independently of this statute, the collector might have been sued for overpayments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency that congress designed to preserve the right of suit in the one case, and to deny it in the other. Yet if these words have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties, no remedy but that of resorting to the secretary of the treasury. It would be difficult to assign any good reason for such a diversity; we think none such was intended, that none such in reality exists, that the law intends merely to declare that if the protest is followed by a suit, the duties in that case, as well as in the other, shall be paid into the treasury, and shall not remain in the hands of the collector to abide the result of the suit. The conclusion to which we have come upon this

statute is greatly strengthened by the act of congress of May 31, 1844, c. 31,¹ which, in suits brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due on merchandise imported, authorizes a writ of error from this court to the circuit courts without regard to the sum in controversy. The object of this law undoubtedly was, to obtain uniformity of decision in regard to the duties imposed. Prior to the act of 1839, there were often differences of opinion in the circuits in the construction of the laws, and in instances, too, in which the amount in controversy was too small to enable either party to bring them here for revisal by writ of error. It can hardly, then, be imagined that when congress was taking measures expressly to secure uniformity of decision and practice in relation to the amount of duties imposed by law, they would have confined the writ of error to cases brought by the United States, when they were of small amount, and refused it in suits against collectors in similar controversies, if they supposed that such suits could still be maintained. Indeed, it has heretofore been in this latter form that the amount of duties claimed has been far more frequently contested, than by suits brought by the United States. And if this form of trying the question had not been intended to be taken away by the act of 1839, there could have been no reason for excluding it from the act of 1844. For the purposes obviously designed by this law, it would have been much more important to the public to have allowed the writ of error in suits against collectors, than in suits instituted by the United States, supposing suits of the former description to be still maintainable; and the omission of such a remedy strongly implies that the legislature supposed such suits could be no longer maintained.

It is contended, however, that the language and the purposes of congress, if really what we hold them to be declared in the statute * of 1839, cannot be sustained, because they would [* 245] be repugnant to the constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. The supremacy of the constitution over all officers and authorities, both of the federal and state governments, and the sanctity of the rights guaranteed by it, none will question. These are *concessa* on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, namely: that the government, as a general rule, claims an exemption from being sued in its own courts.

¹ 5 Stats. at Large, 658.

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That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the constitution, is (except in enumerated instances applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of congress, who possess the sole power of creating the tribunals (inferior to the supreme court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in nowise impaired by admitting that the judicial power shall extend to all cases arising under the constitution and laws of the United States. Perfectly consistent with such an admission is the truth that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.

In devising a system for imposing and collecting the public revenue, it was competent for congress to designate the officer of the government in whom the rights of that government should be represented in any conflict which might arise, and to prescribe the manner of trial. It is not imagined that by so doing congress is justly chargeable with usurpation, or that the citizen is thereby deprived [* 246] * of his rights. There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law. A more striking example of the powers exerted by the government, in relation to its fiscal concerns, than is seen in the act of 1839, is the power of distress and sale, authorized by the act of

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congress of May 15, 1820,¹ (3 Story, 1791,) upon adjustments of accounts by the first comptroller of the treasury. This very strong and summary proceeding has now been in practice for nearly a quarter of a century, without its regularity having been questioned, so far as is known to the court. The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *à fortiori*, they can take no cognizance of matters that by law are either denied to them or expressly referred *ad aliud examen*.

But whilst it has been deemed proper, in examining the question referred by the circuit court, to clear it of embarrassments with which, from its supposed connection with the constitution, it is thought to be environed, this court feel satisfied that such embarrassments exist in imagination only and not in reality; that the case and the question now before them present no interference with the constitution in any one of its provisions, and may be and should be disposed of upon the plainest principles of common right. In testing these propositions, it is proper to recur to the case of Elliott and Swartwout, and again to bring to view the grounds on which that case was ruled. It was, unquestionably, decided upon principles which may be admitted in ordinary cases of agency, which expressly recognize the right, nay, the duty of the agent to retain, and make his omission so to retain an ingredient in the *gravamen* or breach of duty, whence his liability and his promise are implied by the law. The language of the court, 10 Pet. 154, is this: "There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation is given of an intention to seek repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit." Here, then, the right and the duty of retainer are sanctioned in the officer; without them, the notice spoken of would be nugatory—a vain act, which the law never requires. And this right and this duty in the officer, and this injunction of notice to him, must all be understood and are propounded in this decision as principles or precepts of the law, with the knowledge of which each of the parties must stand affected.

The action of *assumpsit* for money had and received, it is said by Lord Mansfield, Burr. 1012, *Moses v. Macferlan*, will lie in general whenever the defendant has received money which is the prop-

¹ 3 Stats. at Large, 592.

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[*247] erty *of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton v. Rastall*, 2 T. R. 370 : " That this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity." These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex equo et bono*, or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them ; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plaintiff's own conduct. So far as the liability of agents in this form of action appears to have been considered, the general rule certainly is, that the action should be brought against the principal and not against a known agent, who is discharged from liability by a *bonâ fide* payment over to his principal, unless anterior to making payment over he shall have had notice from the plaintiff of his right and of his intention to claim the money. The absence of notice will be an exculpation of the agent in every instance. And with regard to the effect of the notice in fixing liability upon the agent, that effect is dependent on the known powers of the agent and the character of his agency. If, for instance, the agent was known to be a mere carrier or vehicle to transfer to his employer the amount received, payment to the agent with such knowledge, although accompanied with a denial of the justice of the demand, would seem to exclude every idea of an agreement, express or implied, on the part of the agent to refund ; and could furnish no ground for this action against the agent who should pay over the fund received to his principal. This doctrine is believed to be sanctioned by the cases of *Greenaway v. Hurd*, 4 T. R. 553, of *Coles v. Wright*, 4 Taunt. 198, and of *Tope v. Hockin*, 7 Barn. & Cres. 101. 'T is true that the case in Taunt. and that from Barn. & Cres. were not instances of payment under protest ; but the case from 4 T. R. has this common feature with that before us, that it was an action against an excise officer for duties said to have been illegally collected, in which the plaintiff denied the legality of the demand, though he subsequently paid it. But all three of these cases concur in condemning the harshness of a rule which would subject an agent, who is a mere channel of conveyance or delivery of the amount which might pass through his hands. Neither of these cases was affected by a positive stat-

utory mandate requiring the agent to make payment over to his principal.

Another principle held to be fundamental to this action is this: that there must exist a privity between the plaintiff and defendant; something on which an obligation, an engagement, a promise from * the latter to the former can be implied; for if such [* 248] implication be excluded from the relation between the parties by positive law, or by inevitable legal intendment, every foundation for the promise and of the action upon it is destroyed; for none can be presumed or permitted to promise what either law or reason does not warrant or may actually forbid. Thus, where bankers received bills from their foreign correspondents, with directions to pay the amount to the plaintiff, but on being applied to by him refused to do so, although they afterwards received the amount of these bills, it was held that an action for money had and received would not lie to recover it from them, there being no privity between them and the plaintiff. Lord Ellenborough observed, the defendants might hold for the benefit of the remitter, until by some engagement entered into by themselves with the persons who were the objects of the remittance, they had precluded themselves from so doing; but here, so far from there being such an engagement, they repudiated it altogether. *Williams v. Everett*, 14 East, 582. Again, where J., an attorney, who was accustomed to receive dues for the plaintiff, went from home, leaving B., his clerk, at the office; B., in the absence of his master, received money on account of the above dues for the client, which he was authorized to do, and gave a receipt "B., for Mr. J." J. was in bad circumstances when he left home, and never returned. B. afterwards refused to pay the money to the client, and on an action for money had and received against him, it was held not to lie; for the defendant received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client for the money received by the clerk, there was no privity of contract between the present plaintiff and the defendant. *Stevens v. Badcock*, 3 Barn. & Adolph. 354. So in the case of *Sims et al. v. Brittain et al.* 4 Ib. 375. A, B, and others, were part-owners of a ship in the service of the East India Company; B was managing owner, and employed C as his agent, and C kept a separate account on his books with B as such managing owner. In order to obtain payment of a sum of money from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners besides the managing owner; and upon a receipt being signed by B and by another of the owners, C received £2,000 on account of the ship, and placed it to

the credit of B in his books as managing owner; the part-owners having brought money had and received to recover the balance of that account, held, that C had received the money as the agent of B, and was accountable to him for it; and that there was no privity between the other part-owners and C, and consequently that the action was not maintainable. To the same effect are the cases of *Rogers v. Kelly*, 2 Camp. 123, and *Edden v. Read*, 3 Ib. 339, and *Wedlake v.*

Hurley, 1 Crompton & Jarvis, 83. If, indeed, the defendant [* 249] has consented (where he can * properly consent) to hold the money for the use of the plaintiff, he may be liable. And it is conceded that his consent need not be express, but it must, if not so, rest upon fair and natural implication or legal intendment. Where such implication or intendment is excluded, forbidden by the position of the parties, by positive law, or by the character of the transaction, consent, or any obligation upon which to imply it is entirely removed.

We have thus stated, and will here recapitulate, the principles on which the action for money had and received may be maintained. They are these: 1. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund. 2. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over has received notice of the plaintiff's claim, and a warning not to part with the fund. 3. Where there exists a privity between the plaintiff and the defendant. Let the case before us be brought to the test of these rules. The 2d section of the act of congress declares, first, that from its passage, all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer, to be kept and applied as all other money paid for duties required by law. Secondly, that they shall not be held by the collector to await any ascertainment of duties, or the result of any litigation concerning the rate or amount of duty legally chargeable or collectable. And, thirdly, that in all cases of dispute as to the rate of duties, application shall be made to the secretary of the treasury, who shall direct the repayment of any money improperly charged. This section, as a part of the public law, must be taken as notice to all revenue officers, and to all importers and others dealing with those officers in the line of their duty. There is nothing obscure or equivocal in this law; it declares to every one subject to the payment of duties, the disposition which shall be made of all payments in future to collectors; tells them those officers shall have no discretion over money

received by them, and especially that they shall never retain it to await the result of any contest concerning the right to it; and that *quoad* this money the statute has converted those officers into mere instruments for its transfer to the treasury. With full knowledge thus imparted by the law, can it be correctly understood that the party making payment can, *ex equo et bono*, recover against the officer for acting in literal conformity with the law, converting thereby the performance of his duty into an offence; or that upon principles of equity and good conscience, an obligation and a promise to refund shall be implied against the express mandate of the law? Such a presumption appears to us to be subversive of every rule of right. The more correct inference seems to be, that payment under such circumstances * must, *ex equo et bono*, nay, *ex neces-* [*250] *sitate*, and in despite of objection made at the time, be taken as being made in conformity with the mandate of the law and the duty of the officer, which exclude not only any implied promise of repayment by the officer, but would render void an express promise by him, founded upon a violation both of the law and of his duty. The claimant had his option to refuse payment; the detention of the goods for the adjustment of duties, being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of, a right of recovery in this particular form of action. And here is presented the answer to the assertion, that by the act of 1839, or by the construction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have congress nor this court furnished the slightest ground for the above assertion.

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But the objection to a recovery in this action may be further extended, upon grounds which to the court appear to be insuperable. We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such case the duty of the defendant to pay, the law imputes to him a promise to pay. This promise is always charged in the declaration, and must be so charged in order to maintain the action. It was upon this principle that the action for money had and received was sustained in the case of *Elliott v. Swartwout*, 10 Pet. 137. There money had been taken by the collector for duties which were not imposed. This money lawfully belonged to the plaintiff; it was the duty, therefore, of the collector to pay it back to him. The collector was not bound to pay it to the treasurer, for the law did not command this disposition of it. It did not belong to the United States, who had no right, therefore, to demand it of him, and could not have recovered it against him, in a suit, if he had paid it back [*251] to the true *owner. It being the duty of the collector to return what he had unlawfully taken, the law implied on his part a promise to do so; and on this implied promise, arising or inferred from a duty imposed upon him, the action was maintained. The protest and notice were to him of no further importance than to warn him to hold over, and to take away an excuse he might otherwise have had from payment to his principal. It was his duty, as the law then stood, not to pay over, but to pay back to the party from whom he had collected without legal authority, when warned that this party should look to him for reimbursement, and not to his principal. But the law never implies a promise to pay, unless duty creates the obligation to pay; and more especially it never implies a promise to do an act contrary to duty or contrary to law. Now, under the statute of 1839, if the collector receives money, though for duties not due, it is nevertheless made his duty to pay it into the treasury, to be repaid there, if the party claiming is found to be entitled to it. And the question here is, will the law imply a promise from the collector to do that which is contrary to his official duty, contrary to the command of a positive statute? If it will not, then the action of *assumpsit* for money had and received, will not lie in this case.

Moreover, the law will never imply a promise where it would be unjust to the party to whom it would be imputed, and contrary to equity so to imply it. Suppose the collector should not, as directed by law, pay the money into the treasury, the United States might undoubtedly maintain an action against him for money had and

received to their use. Because it being his duty to do so, the law would imply a promise to pay it. Can the law at the same time imply a promise to pay it elsewhere or to another, and thus burden the collector with the double obligation of paying to the government, and also to one claiming in adversary interest? If suits were instituted against him by both parties, and were standing for trial at the same time, would both be entitled to a recovery, and would the law imply promises to both, promises to pay double the amount received? We think not; and as the law in positive terms directs payment to be made into the treasury, there can be no judicial implication contrary to law, nor that the collector will pay to another what the law directs him to pay to the United States; and no judicial implication which would require him to be guilty of an act of official misconduct, or a breach of his duty to the public. If the law implies a promise to pay back to the party, then it must be the duty of the collector to do so as soon as it is demanded. If the money may be recovered of him by suit, then he would be justified in paying without suit, yet if he does so pay, he not only violates a duty imposed by law, but may be compelled to pay over again to the government, as for so much money had and received to its use. We think the law can never imply a promise which must be unjust and oppressive in its results to the party, or contrary to his duty as a public officer; and there being no implied promise, therefore, in [* 252] this case the action for money had and received cannot be maintained. It is perfectly clear to the court that, under the act of 1839, the United States have, by express law, a right to demand the money from the collector, and to recover it in an action for money had and received, even if that officer had paid it over to the person from whom he had received it; and we say with confidence that in the multitude of cases that have been decided in relation to that action, there is not one in which it has been held that money could be recovered from a defendant when his voluntary payment of it would leave him still liable to an action for the same money by another.

We deem it unnecessary to examine further the grounds stated in the second and third heads of inquiry, as forming the foundation of the action for money had and received; or to bring to a particular comparison with those grounds the law and the facts of this case, as presented upon the record. The illustrations given under the first head embrace all that is important under the remaining divisions, with respect to the nature of the demand and the position of the parties. Those illustrations establish, in the view of the court, that, so far is the defendant from being obliged, by the ties of natural

equity and justice, to refund to the plaintiff the money received for duties, that, on the contrary, under that notice of the law which all must be presumed to possess, the payment must be understood as having been made with knowledge of the parties that the right of retaining or of refunding the money did not exist in the defendant; that the money by law must pass from him immediately upon its receipt; that payment to him was in legal effect payment into the treasury; that notice to him was, under such circumstances, of no effect to bind him to refund; that as the collector, since the statute, had power neither to retain nor refund, there could, as between him and the plaintiff, arise no privity nor implication, on which to found the promise raised by the law, only where an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not, in this case, be maintained, but was barred by the act of congress of 1839. •

STORY, J. I regret exceedingly being compelled by a sense of duty to express openly my dissent from the opinion of the majority of the court in this case. On ordinary occasions my habit is to submit in silence to the judgment of the court where I happen to entertain an opinion different from that of my brethren. But the present case involves, in my judgment, doctrines and consequences which, with the utmost deference and respect for those who think otherwise, I cannot but deem most deeply affecting the rights of all our citizens, and calculated to supersede the great guards of those rights intended to be secured by the constitution through the instrumentality of the *judicial power, state or national. The question, stripped of all formalities, is neither more nor less than this: Whether congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the secretary of the treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right? If congress may do so in the present case, in the exercise of its power to levy and collect taxes and duties, and thus take away from all courts, state and national, all right to interpret the laws for levying and collecting taxes and duties, and to confide such interpretation to one of its own executive functionaries, whose judgment is to be at once summary and final, then I must say, that it seems to me to be not what I had hitherto supposed it to be; a government where the three great departments, legislative, executive, and judicial, had independent

duties to perform, each in its own sphere; but the judicial power, designed by the constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions. I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our constitution? I cannot bring my mind to believe it; and, therefore, I repeat it, with the most sincere respect for my brethren, who entertain a different opinion, I deny the constitutional authority of congress to delegate such functions to any executive officer, or to take away all right of action for an admitted wrong and illegal exercise of power in the levy of money from the injured citizens. I am further of opinion, as I shall endeavor presently to show, that congress never had contemplated passing any such act, and that the act of the 3d of March, 1839, c. 82, § 2, neither requires, nor in my humble judgment, justifies such an interpretation.

What is the real question presented, upon the division of opinion in the circuit court, for the consideration of this court? It is not whether an action to recover back the money illegally claimed and paid to the collector for duties, in order to obtain possession * of the goods by the owner under a protest that they were [* 254] not legally due, would lie in the circuit court, for no such question arises on the record, and it is incontrovertible and uncontroverted, that if any such action would lie, it would lie in the national courts as well as in the state courts. It is not whether congress may limit, restrain, modify, or even take away the right to sue in the national courts, in cases like the present, or, indeed, in any other class of cases not constitutionally provided for, but it is simply whether the act of congress of the 3d of March, 1839, c. 82, § 2, is a bar to such an action in any court, state or national. If it is a good bar in one court, it is good in all courts under the provisions of that act. If congress have a right to say, and have said, under the provisions of that act, that no officers of the customs shall be liable to

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any action for money extorted by him under color of his office without authority and against law, then these provisions are equally applicable to all courts, and furnish the rule of decision for all. And congress have an equal right to apply a like provision to all other acts of all other officers done under color of office, and the trial by jury may, in suits at common law, be completely taken away in all such cases, and the right of final decision be exclusively vested in the executive, or in any other public functionary, at the pleasure of congress.

Now, how stands the common law on this very subject? It is that an action for money had and received lies in all cases to recover back money which a person pays to another in order to obtain possession of his goods from the latter, who withholds them from him upon an illegal demand, or claim, *colore officii*, and thus wrongfully receives and withholds the money. Such a payment is in no just sense treated in law as a voluntary payment, but it is treated as a payment made by compulsion, and extorted by the necessities of the party who pays it. Such is the doctrine of the common law as held in England, with a firm and steady hand, against all the claims of prerogative, and it is maintained in our day as the undeniable right of every Englishman, against the unjust and illegal exactions of officers of the crown. Bayley, J., laid down the general principle with great exactness in *Shaw v. Woodcock*, 7 Barn. & Cres. 73, 84, and said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back." In *Irving v. Wilson*, 4 Term R. 485, the doctrine was applied to the very case of the acts of an officer of the excise or customs. Upon that occasion Lord Kenyon emphatically said: "The revenue laws ought not to be made the means of oppressing the subject. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king, but he is not permitted to abuse the duties of his station, and [* 255] * to make it a mode of extortion." There are many other authorities leading to the same result, but it is unnecessary to cite them, since the very point that an action for money had and received lies against a collector of the customs to recover back money demanded by and paid to him, *colore officii*, upon goods imported, for duties not legally due thereon, has been, upon the most solemn deliberation, held by this court in the cases of *Elliott v. Swartwout*, 10 Pet. 137, and *Bend v. Hoyt*, 13 Pet. 263, 267.

It is an entire mistake of the true meaning of the rule of the common law, which is sometimes suggested in argument, that the action of *assumpsit* for money had and received, is founded upon a voluntary, express, or implied promise of the defendant, or that it requires privity between the parties *ex contractu* to support it. The rule of the common law has a much broader and deeper foundation. Wherever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him *in invitum* to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor. The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action, that it must arise under or in virtue of some contract, is disregarded, upon the maxim *qui hæret in litera, hæret in cortice*. Hence, it is a doctrine of the common law, (as far as my researches extend,) absolutely universal, that if a man, by fraud, or wrong, or illegality, obtains, or exacts, or retains money justly belonging to another, with notice that the latter contests the right of the former to receive, or exact, or retain it, an action for money had and received lies to recover it back; and it is no answer for the wrongdoer to say that he has paid it over to his superior; for, although as between the wrongdoer and his superior, the maxim may well apply, *respondeat superior*, yet the injured party is not bound to seek redress in that direction; and *à fortiori*, &c., he is not so bound, where, as in the case of the government, the superior is not suable. That would be a mere mockery of justice. And this is the very doctrine affirmed in its full extent by this court in the cases of *Elliott v. Swartwout*, 10 Pet. 137, and *Bend v. Hoyt*, 13 Pet. 263, 267.

An action for money had and received being then the known and appropriate remedy of the common law, applied to cases of this sort, to protect the subject from illegal taxation, and duties levied by public officers, what ground is there to suppose that congress could intend to take away so important and valuable a remedy, and leave our citizens utterly without any adequate protection? It is said, that circuitously another remedy may be found. The answer is, that if congress have taken away the direct remedy, the [* 256] circuitous remedy must be equally barred. But in point of fact no other judicial remedy does exist or can be applied. If the collector is not responsible to pay back the money, nobody is. The government itself is not suable at all; and certainly there is no pre-

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tence to say that the secretary of the treasury is suable therefor. Where then is the remedy which is supposed to exist? It is an appeal to the secretary of the treasury for a return of the money, if in his opinion it ought to be returned, and not otherwise. No court, no jury, nay, not even the ordinary rules of evidence, are to pass between that officer and the injured claimant, to try his rights or to secure him adequate redress. Assuming that the secretary of the treasury will always be disposed to do what he deems to be right in the exercise of his discretion, and that he possesses all the qualifications requisite to perform this duty, among the other complicated duties of his office — a presumption which I am in no manner disposed to question — still, it removes not a single objection. It is, after all, a substitution of executive authority and discretion for judicial remedies. Nor should it be disguised, that upon so complicated a subject as the nature and character of articles made subject to duties, grave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision, and falls within the reach of that branch of the judicial power given by the constitution, where it is declared “that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties,” &c. If, then, the judicial power is to extend to all cases arising under the laws of the United States, upon what ground are we to say that cases of this sort, which are eminently “cases arising under the laws,” and of a judicial nature, are to be excluded from judicial cognizance, and lodged with an executive functionary?

Besides, we all know that, in all revenue cases, it is the constant practice of the secretary of the treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. I will venture to assert that, in nineteen cases out of twenty of doubtful interpretation of any such laws, the collector never acts without the express instructions of the secretary of the treasury. So that in most, if not in all cases where a controversy arises, the secretary of the treasury has already pronounced his own judgment. Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of this

*court as well as those of the other courts of the United [*257] States, establish in the fullest manner, that the interpretations so given by the secretary of the treasury have, in many instances, differed widely from those of the courts. The constitution looks to the courts as the final interpreters of the laws. Yet the opinion maintained by my brethren does, in effect, vest such interpretation exclusively in that officer.

These considerations have led me to the conclusion that it never could be the intention of congress to pass any statute, by which the courts of the United States, as well as the state courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them; a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties. The same considerations force me, in all cases of doubtful or ambiguous language admitting of different interpretations, to cling to that which should least trench upon those rights, privileges, and liberties, and *à fortiori* to adopt that which would be in general harmony with our whole system of government.

And this leads me to say that, after the most careful examination of the 2d section of the act of 1839, c. 82, I have not been able to find any ground to presume that congress ever contemplated any thing contained in that section to be a bar to the present action. I look upon that section as framed for a very different object, an object founded in sound policy and to secure the public interest. It was to prevent officers of the customs from retaining (as the habit of some had been) large sums of money in their hands received for duties, upon the pretence that they had been paid under protest, and thus to secure in the hands of the officers a sufficient indemnity for all present as well as future liabilities to the persons who had paid them. By this means, large sums of money were withheld from the government, and there was imminent danger that severe losses might thus be sustained from the defalcation of those officers, and the public revenue might be thus appropriated to the personal business or speculating concerns of the officers. If actions should be brought and judgment obtained against such officers for the repayment of any of such duties, it was plain that the government would be bound to indemnify them, especially if they had acted under instructions from the treasury department. On the other hand, the government, being in possession of the money, would hold it in the mean time as a deposit to await events, and to refund the same if in the due administration of the law it was adjudged that it ought to be refunded. Such, in

my judgment, was the object and the sole object of the section, and seems to me in this view to be founded in a wise protective policy.

[* 258] * With this exposition in our view, let us examine the language of the section. It is as follows: "That from and after the passage of this act, all money paid to any collector of the customs or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the treasury department to be placed to the credit of said treasurer, kept and disposed of; and shall not be held by the said collector or person acting as such to await any ascertainment of duty, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid." Now, pausing here, it seems to me that the clause is plainly and merely directory to the collector or person acting as such, pointing out his duty and requiring him to pass the money so paid to the credit of the government as soon as it is received. Nothing is here said as to the rights of third persons, who pay the money for duties; no declaration is made that the collector shall not be liable to any action for such duties, if not legally demandable or payable, or that the collector or such other person shall not be liable to refund the same. And yet, if such had been the intention of congress, it seems to me incredible that a provision to this effect should not have been found in the act. But further: not only is there a total absence of any such provision, but there is positive evidence that congress contemplated that there would be suits brought against the collectors and other persons for the repayment of such duties, and, accordingly, as we see, the money is not to be retained by them "to await any ascertainment of duties or the result of any litigation." The language is not limited to the result of past or pending litigation, but it equally applies to future litigation; in short, any litigation, without any limitation as to time, and indeed, to be coextensive with the permanent prospective operation of the act. If, then, there is in this clause no positive or implied bar to any action provided for, and if the clause is perfectly satisfied by deeming it to be what it professes on its face to be, a regulation addressed to the collectors and other persons collecting duties, and directory to them, let us see if the subsequent clause, which contains the residue of the section, either enlarges, or qualifies, or repels the inferences drawn from the preceding clause. This clause is: "But whenever it shall be shown to the satisfaction of the

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secretary of the treasury, that, in any case of unascertained duty or duties paid under protest, more money has been paid to the collector or other person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated."

* This is the whole of the clause, and, unless I am greatly [*259] deceived in its purport and effect, not one word is to be found therein which bars the party who has paid the money from his right of action against the collector or other persons acting as such to recover back the money illegally claimed, or which compels such party to make his application or appeal solely to the secretary of the treasury for redress, or gives to the latter exclusive power, jurisdiction, and final arbitrament in the premises. The true object of this clause seems to be precisely what its language imports, to give the secretary of the treasury a power which he did not previously possess, to draw from the treasury money which had been overpaid for duties when he was satisfied of such overpayment, upon the application of the party interested. It was not to be compulsive on the party, that he should so apply, but he had an option to apply to the secretary, to save the delay and expense of a protracted litigation, if the secretary should grant him the desired relief. It would also diminish the necessity of applications to congress for the repayment of money which had been illegally paid for duties, by enabling the secretary to draw his warrant upon the treasury for the amount; which relief, when the money had been paid into the treasury, could not before be obtained except by means of an act of congress. It was, therefore, an auxiliary provision to the general rights of action secured to the party by the common law, and not in extinguishment or suspension of it. Whether the clause clothed the secretary also with authority to draw a warrant in favor of the party, if he recovered back the money in a suit at law against the collector, is a matter which might, upon the strict words of the clause, admit of some doubt, since the case provided for is only where the overpayment shall be shown to the satisfaction of the secretary, and not where it is a result of a judgment at law. But a liberal construction might embrace such a case also, as within the intent, if not strictly within the words. But be this as it may, it is manifest to my mind, with all deference to the judgment of others, that the affirmative power thus given by this clause to the secretary, cannot be construed to exclude the right of the party to his remedy at the common law without a violation of the known rules of interpretation, by adding important and material

language which the legislature has not used, and incorporating provisions which neither the words nor the professed objects of the section require.

Nor am I able to perceive any grounds upon which a different interpretation can be maintained, unless it be, that it would be a hardship upon the collector to require him to pay money over to the government which he might be compelled again to pay to the party from whom he had illegally demanded it. One answer to this suggestion is, that he cannot complain, because it is his own choice to hold an office to which such a duty or responsibility is attached, and if he elects to hold it, he ought to take it *cum onere*.

[*260] * Another and conclusive answer is, that he has a perfect right of indemnity from the government; nor can it be doubted that the government will always indemnify all its officers for acts done by its orders and demands made under its authority. On the other hand, an extreme hardship would be thrown upon the injured party, whose money is taken from him against his will by color of office, and against his right, if his common law remedy is swept away; for then he can have no means of redress, and no indemnity, since he has resisted the demands of the government and asserts an adversary interest.

Nor is it any ground of excuse, (as has been already suggested,) in case of money paid by compulsion, that the officer has paid over the money to his principal; and in this respect it differs from the case of a voluntary payment. This distinction was taken and acted upon in the case of *Snowden v. Davis*, 1 Taunt. 358, where money had been paid to a bailiff under a threat of a distress by an excess of authority, and the money had been paid over by him to the sheriff, and by the latter into the exchequer. And the same doctrine was fully recognized and confirmed by this court, upon the most solemn consideration, in *Elliott v. Swartwout*, 10 Pet. 137, after a full review of all the leading authorities.

Upon the whole, my opinion is, that the question propounded by the circuit court upon the division of opinion of the judges in that court, ought to be answered in the negative, that the 2d section of the act of 3d of March, 1839, c. 82, was no bar to the action.

M'LEAN, J. This suit was brought to recover from the defendant, collector of the customs, an excess of duties exacted by him of the plaintiffs against law. And on the trial in the circuit court the judges were divided on the question, "whether the act of the 3d of March, 1839, was a bar to the action." This point has been certified to this court.

The 2d section of the above act provides: "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the treasury department to be placed to the credit of the said treasurer, kept and disposed of; and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the secretary of the treasury, that, in any case of unascertained duties, or duties paid under protest, * more [*261] money has been paid to the collector or person acting as such than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated."

In the case of *Elliott v. Swartwout*, 10 Pet. 137, and in *Bend v. Hoyt*, 13 Pet. 263, this court held, that illegal duties exacted by the collector were recoverable from him, where paid under protest, by the importer, in an action of *assumpsit*. This doctrine is not questioned in this country or in England. Has the 2d section of the act above cited changed the law in this respect? A majority of the judges have decided in the affirmative, and that that act constitutes a bar to an action in such a case. I dissent from the opinion of the court.

The above section, in my judgment, so far from taking away the legal remedy, expressly recognizes it. The collector is required, "from and after the passage of the act," to pay over to the treasurer the moneys in his hands, and not "to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable," &c. Now, if congress intended by this section to withdraw this subject from the courts, and vest the exclusive right to decide the matter in the secretary of the treasury, could they have used this language? The law was not to operate upon the past, but upon the future acts of the collector. And I ask, in sober earnestness, whether the collector could be required to pay over money, "and not await the result of a litigation," as "to the amount of duties legally chargeable," if the intention was to prohibit such litigation. I use the words of the section; and the words of the section alone, as I think, are conclusive as to the intention of congress. The collector must pay over the money, and not retain it until the

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termination of a suit. Does this take away the right to bring a suit? Such an inference, it seems to me, would be as exceptionable in logic as in law.

From the proceedings of this court we know that collectors of the customs, after their removal from office or the expiration of their term, and sometimes while in office, under the pretext of indemnifying themselves against suits for the exaction of illegal duties, were in the practice of withholding from the treasury large sums of money. And it was to remedy this evil that the above law was passed. As to the remission of duties illegally charged, it vested in the secretary no new powers; but it authorizes him, where the excess of duty has been paid into the treasury, to draw it out by a warrant, and pay it over to the person entitled to receive it. By the 21st section of the duty act of 1799,¹ 1 Story, 592, the collectors "were required, at all times, to pay to the order of the proper officer the whole of the moneys which they may respectively receive, &c., and shall once in three months, or oftener if required, transmit their accounts,"

[*262] * &c. Now, it is known from public documents, and from cases before this court, that the secretary of the treasury has, for a long time before the act of 1839, required the collector of New York to pay over moneys received by him, weekly or at short intervals. And can it be pretended that the act of 1799, under the instructions of the secretary of the treasury, was not as binding upon collectors as the act of 1839? In a legal point of view, the liability of a collector was the same for illegal duties received by him, whether paid into the treasury under the one law or the other.

It is said that the law cannot raise a promise to pay by an officer, where it requires him to pay the same money into the treasury. The action is founded on the illegality of the transaction. None other than legal duties are payable to the government; and where an officer, by his own volition, or acting under the instructions of his superior, demands a higher duty than the law authorizes, he is guilty of a wrong which his instructions cannot justify. And having done this, can it be contended that, by paying over moneys so obtained, he can escape the legal consequence of his unlawful act? Where one person obtains money illegally from another, is he not bound in conscience to return it? And may not an action of *assumpsit* be sustained for the recovery of the money? In such an action the question is, whether the defendant has received money which he is bound in good conscience to pay to the plaintiff. Now, if the defendant, as collector, exacted a higher duty of the plaintiffs

¹ 1 Stats. at Large, 642.

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than the law authorized, is he not bound in conscience to return the excess? But it is said that he has paid it over to the treasury of the United States, in pursuance of the act of 1839, and that this is a bar to the action. Why has not this bar been set up under the act of 1799? By that act the collector, when ordered by the secretary of the treasury, was as much bound to pay over the money in his hands into the treasury as under the act of 1839. And yet, for forty-four years, such a defence has not been thought of. It has never been supposed that the payment of the money into the treasury exonerated the collector. He has violated the law, and he is answerable for that violation. This must be the case, unless, in the language of this court in the case of *Elliott v. Swartwout*, above cited, "the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle," the court say, "would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy."

In *Townson v. Wilson et al.* 1 Camp. 396, Lord Ellenborough says: "If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another." The same doctrine is held in *Sadler v. Evans*, 4 Burr. 1986. And this court, in the above case of *Elliott v. Swartwout*, say: "It may be assumed as the *settled doctrine of the law, that where money is [*263] illegally demanded and received by an agent, he cannot exonerate himself from responsibility by paying it over to his principal, if he has had notice not to pay it over." A notice not to pay over the money to the principal, it is contended, presupposes a right in the agent to retain it. No such inference could arise under the act of 1799, nor can it be made under the present law. The notice should induce the collector to reconsider his act, and if found to have been against law, to correct it. But it is said, he may have acted under the orders of the secretary of the treasury. Suppose he did, would that justify or excuse an illegal act? I will answer this language of this court in the case last cited: "Any instructions from the treasury department could not change the law or affect the rights of the plaintiff. He, the collector, was not bound to take and adopt that instruction. He was at liberty to judge for himself, and act accordingly." And in *Tracy v. Swartwout*, 10 Pet. 99, this court say, "that the personal inconvenience of the collector is not to be considered." When acting under instructions the government is bound to indemnify him. In my judgment the act of 1839 interposes no bar to this action.

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But there is another aspect in which this case must be considered. Feeling, as I do, an unfeigned respect for the opinion of the judges who differ from me, yet I cannot, without concern, look at the consequences of the principle established in this case. The right of a citizen to resort to the judicial tribunals of the country, federal or state, for redress for an injury done by a public officer, is taken away by the construction of an act of congress, which, in my judgment, bears no such construction. But I will take higher ground, and say, that congress have no constitutional power to pass such an act as the statute of 1839 is construed to be by this decision.

By the 2d section of the 3d article of the constitution of the United States, the judicial power extends to all cases in law and equity arising under the constitution and laws of the Union. And by the 7th section of the amendments to the constitution it is provided, that "in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved."

The act of 1839, in my judgment, does not conflict with either of the above constitutional provisions. But if it take away the right of the citizen to sue in a court of law for the injury complained of, as construed by my brethren, then it is in direct conflict with both of the above provisions.

In a matter of private right it takes from the judiciary the power of construing the law, and vests it in the secretary of the treasury, the executive officer under whose sanction or instruction the wrong complained of was done.

[* 264] * And in the second place, it takes from the citizen the right of trial by jury, which is expressly given to him by the constitution.

I again repeat that congress have not done this, nor did they intend to do it by the act of 1839. But the act is so construed by the decision just pronounced. Under this view I feel myself bound to consider the principle established by the court, and to speak of its consequences.

That the act, as construed, is in direct conflict with the above provisions of the constitution, is so palpable that it seems to me no illustration could make it clearer.

The right to construe the laws in all matters of controversy, is of the very essence of judicial power. Executive officers who are required to act under the laws, of necessity, must give a construction to them. But their construction is not final. When it operates injuriously to the citizen, he may, by any and every possible means through which it may be brought before the courts, have the construction of the law submitted to them, and their decision is final.

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But the court say, that the plaintiffs in this case cannot seek redress for the injury complained of, by an action at law, but, under the act of 1839, are referred to the secretary of the treasury; an executive officer, who has prejudged the case, who can exercise neither the forms nor the functions of a judicial officer; who acts summarily, without a jury, and from whose judgment there is no appeal. The case turns upon facts; facts properly triable by a jury. The question is, whether the articles on which the duties have been assessed, are such articles as under the law are liable to be thus taxed. This is a question most fit to be answered by a jury of merchants, under the instructions of a court of law. The plaintiffs allege that the duty was not authorized by law, but, to obtain possession of their goods, they were compelled to pay it, protesting against the right of the government. And they brought an action at law to recover from the collector the excess of duty paid. This course had been sanctioned by previous decisions. It was, in fact, the only effectual course they could take to obtain possession of their goods. A tender of the legal duty, and a replevin, if it would lie, involved the necessity of security for a return of the goods which, if in the power of the importers, might not have been convenient to them. But a replevin is expressly prohibited in such a case by the act of 2d March, 1833.¹

The question arises on the facts stated. Illegal duties were demanded by the collector and paid to him by the plaintiffs, before they could obtain their goods; and the question is, has their remedy at law been cut off by the statute of 1839? This is a taxing power; the most delicate power that is exercised by the government. It reaches the concerns of the citizen, and takes from him a part of his property for purposes of revenue. The tax should be judicious, and the mode of collecting it should be specially guarded. Care should be taken not to infringe private right in making [*265] this public exaction. But especially where, in this respect, a wrong has been done to the citizen, the courts should be open to him. His remedy should be without obstruction. But my brethren say that the act of 1839 takes away from the plaintiffs all remedy except an appeal to the secretary. The state courts as well as the federal are closed against the injured party.

The able men who laid the foundations of this government saw that, to secure the great objects they had in view, the executive, legislative, and judicial powers, must occupy distinct and independent spheres of action. That the union of these in one individual

¹ 4 Stats. at Large, 632.

or body of men constitutes a despotism. And every approximation to this union partakes of this character.

What though no positive injustice be done to the plaintiffs in this case; is that any reason why the great principle involved in it should be yielded? What is this principle? It is nothing less than this; that throughout the whole course of executive action, summary, diversified, and multiform as it is, for wrongs done the citizen, all legal redress may be withdrawn from him; and he may be turned over as a petitioner to the power that did the wrong. If this may be done in the case under consideration, it may, on the same principle, be done in every similar case.

A seizure of a vessel and cargo may be made by an officer under a supposed breach of the revenue law, and the question of forfeiture may be referred to the secretary of the treasury. Private property may be taken for public purposes, and the owner may be limited to the remedy, if remedy it may be called, of petitioning some executive officer for remuneration. Military violence may be perpetrated on the person of a citizen or on his property, and his relief may be made to depend on the will of the commander-in-chief. In short, in every line of the executive power, wrongs may be done, and legal redress may be denied.

The cases put may seem to be extreme ones, and therefore not likely to happen. But do they not test the principle? I think they do. If congress may deprive these plaintiffs of their remedy by action at law, they may do the same thing in the cases specified. Indeed, it would be difficult to prescribe any limit to legislative action on this subject. It can, at least, be extended through all the ramifications of executive power.

To say that this will never be done, and that the consequences spoken of can never happen, is no answer to the argument. Do the consequences lie within the exercise of the principle? If they do, the consequences must follow a general exercise of the power. The danger is in sanctioning the principle. At this point, I meet the principle and combat it. I object to it because it is dangerous and may be ruinous. It takes from the citizen his rights—rights secured to him by the constitution; the trial by jury, in a court of [*266] *law. This is done by the act of 1839, if it be what it is now construed to be. In this aspect, then, I say, the act is unconstitutional and void. It not only strikes down the rights of the citizen, but it inflicts a blow on the judicial power of the country. It unites, in the same department, the executive and judicial power. And on a subject the most delicate and interesting; and one which, of all others, may most easily be converted into an engine of oppression.

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In this government, balances and checks have been carefully adjusted, with a view to secure public and private rights; and any departure from this organization endangers all. We have less to apprehend from a bold and open usurpation by one department of the government, of powers which belong to another, than by a more gradual and insidious course. In my judgment, no principle can be more dangerous than the one mentioned in this case. It covers from legal responsibility executive officers. In the performance of their ministerial duties, however, they may disregard and trample upon the rights of the citizen, he can claim no indemnity by an action at law. This doctrine has no standing in England. No ministerial officer in that country is sheltered from legal responsibility. Shall we in this country be less jealous of private rights and of the exercise of power? Is it not our boast that the law is paramount, and that all are subject to it, from the highest officer of the country to its humblest citizen? But can this be the case if any or every executive officer is clothed with the immunities of the sovereignty? If he cannot be sued, what may he not do with impunity. I am sure that my brethren are as sincere as I am, in their convictions of what the law is, in this case; and I have only to regret that their views do not coincide with those I have stated.

4 H. 827; 8 H. 441; 2 B. 461; 5 Wal. 720; 7 Wal. 122.

ROBERT WHITE, Plaintiff in Error, v. WILLIAM S. NICHOLLS, WILLIAM ROBINSON, OTHO M. LINTHICUM, EDWARD M. LINTHICUM, RAPHAEL SEMMES, PAUL STEVENS, and CHARLES C. FULTON, Defendants in Error. ROBERT WHITE, Plaintiff in Error, v. HENRY ADDISON, Defendant in Error.

3 H. 266.

Though a communication be privileged, if it be malicious, an action lies; but the plaintiff must aver and prove actual malice.

It is not necessary to aver, in the declaration, the facts constituting malice; it is enough to allege the writing was maliciously published.

Want of probable cause will authorize the inference of malice.

A letter to the President of the United States, containing charges against one in public office under the executive government, if false and malicious, is actionable.

ERROR to the circuit court of the District of Columbia, in two actions for libel, both being tried together and depending on the same facts. The libel declared on was as follows:—

“Georgetown, June 26, 1841.

*“Sir: We feel it to be proper to put you in possession of [*267] the grounds upon which the removal of Mr. Robert White,

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from the office of collector of customs of this port is requested. You will recollect the humiliating and prostrate condition of the people of this district about a year ago, when the majority then in congress determined to destroy our banks as a punishment upon us for having avowed and published our preference for the candidates of the great whig party. It was in that dark season that Mr. White determined to desert his own fellow-citizens, and to join in the war which was making upon their liberties and interests. Being then seeking office, he thought to recommend himself to the executive by getting up a memorial here, which was to be used as a sanction or approval, on the part of our own citizens, of the mad policy which had been adopted by their oppressors. He then joined with an assemblage of forty-eight persons in getting up a memorial, which none but themselves could be induced to sign. These memorialists, with about

five exceptions, could not be identified by name or residence, *as citizens of Georgetown. Upon investigation, they proved to be apprentices and journeymen, holding a transient residence in the town. Being few in number, they were no doubt believed by congress, and persons at a distance, to be a select body of experienced merchants and traders, who had some knowledge of the subject of their memorial. A copy of the memorial has been deposited with the secretary of the treasury.

“ It is, perhaps, one of the vilest calumnies ever issued by a band of thoughtless and irresponsible individuals, many of whom would have shrunk from such a proceeding had they the necessary intelligence to comprehend its enormity. But not so with Mr. White. He knew the paper contained an unmitigated slander. He seemed to be willing to blacken the character of those of his fellow-citizens who had been intrusted with the charge of our banks, if that would only secure an appointment, when all other methods had failed him, for the preceding twelve years.

“ We revolt at the idea of Mr. White being permitted to remain in an office whose emoluments flow from the labor and enterprise of the very men whose business and families he sought to involve in ruin.

“ It is impossible that he can ever regain the confidence of men whom he abandoned and vilified in the darkest hour of their existence. His expulsion from office is no less demanded by his unpardonable conduct, than by justice to the wounded feelings of an injured community.

“ About the same time, June, 1840, with the persons under his influence, and as is believed at the request of an office holder of great political rancor, Mr. White procured Dr. Duncan, then a member of congress from Ohio, to deliver a speech here in abuse of General

Harrison. The speech was, perhaps, the very vilest that was ever delivered by that gentleman.

"It was so satisfactory to Mr. White, who acted as vice-president on the occasion, that he immediately rose, and moved the doctor a vote of thanks, and a request that the speech be furnished for publication. The resolutions, which were adopted unanimously on the occasion, were nearly as calumnious as the speech itself.

"We refer you to the Globe newspaper of the 3d July last, for an official account of the proceedings of the meeting. We will only trouble you with a few sentences, that you may have some idea of the character of those extraordinary proceedings. They denounced General Harrison as 'the nominee of the bank whig federalist, abolitionist and antimasons,' 'an abolitionist of fraud and concealment,' as being guilty of pursuing a course 'grossly insulting to common sense, honesty, and decency, by shrouding himself in darkness,' 'of courting dangerous fanatics, and countenancing them (abolitionists) in their mad warfare upon our peace, our property, and our lives,' and 'that he should be treated as [*269] an abolitionist.'

"Mr. White's was the place where the leading men of his party nightly assembled up to the close of the presidential election, and a respectable citizen declares that, since Mr. White's appointment, he circulated 'bushels' of the 'Globe.' He declines to give his formal evidence in the case, upon the ground that he, being a near neighbor of Mr. W., he is unwilling to disturb the friendly personal relations existing between them.

"Such was Mr. White's general political violence, and the unhesitancy with which he descended to the lowest means to secure the favor of the late administration, that no one doubted here but that he would be dismissed when the present party came into power, and no one can be more astonished than Mr. White is himself at his retention to the present time.

"We will also take this opportunity to state, that we desire Mr. H. Addison to be appointed to the office of collector in Mr. White's place, whose abundant testimonials and recommendations of our business citizens are already on file with the secretary of the treasury.

"With great respect, your obedient servants,

CHAS. C. FULTON,
E. M. LINTHICUM,
RAP. SEMMES,
O. M. LINTHICUM,
WM. ROBINSON,
WM. S. NICHOLLS,
PAUL STEVENS

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“ P. S. It is further proper to state, that Mr. Addison’s recommendations, filed with Mr. Ewing, are signed by every citizen in town, with a single exception, who have regular business to transact at the custom-house.”

The plaintiff, having proved the publication, offered evidence tending to prove that he held the office mentioned; that he had been removed therefrom; that the charges were false; that the defendants had no probable cause to believe them to be true; and that they were actuated by malice.

The court refused to allow the alleged libel to be read to the jury, and the plaintiff excepted.

May and R. Brent, for the plaintiff.

Bradley and Coxe, contra.

[* 284] * DANIEL, J., delivered the opinion of the court.

In the investigation of these cases it is deemed unnecessary to examine *seriatim* the five bills of exceptions sealed by the circuit court, and made parts of the record in each of them. The papers declared upon as libellous, and the instructions asked of the circuit court, are literally the same in both actions; the reasons too, which influenced the decision of the court, pervade the whole of these instructions, and are presented upon their face.

Before proceeding more particularly to consider the rulings of the court upon these instructions, it may be proper to animadvert upon a point of pleading which was incidentally raised in the argument for the defendants in error; which point was this; that, assuming the publication declared on as a libel to be one which would be *prima facie* privileged, the circumstances which would render it illegal, in other words, the malice which prompted it, must be expressly averred. Upon this point the court will observe, in the first place, that in cases like the one supposed in argument, they hold, that in describing the act complained of, the word “ maliciously ” is not indispensable to characterize it; they think that the law is satisfied with words of equivalent power and import; thus, for instance, the word “ falsely ” has been held to be sufficiently expressive of a malicious intent, as will be seen in the authorities cited, 2 Saund. 242, a, (note 2.) But the declaration in each of these cases charges the defendants, in terms, with maliciously and wickedly intending to injure the plaintiff in his character, and thereby to effect his removal from office, and the appointment of one of the defendants in his stead; and with that

view, with having falsely, wickedly, and maliciously composed and published, and having caused to be composed and published, a false, malicious, and defamatory libel concerning the plaintiff, both as a citizen and an officer. The averments in these declarations appear to the court, in point of fact, to be full up to the requirement insisted on, and to leave no room for the criticism attempted with respect to them. But the defence set up for the defendants in error reaches much further and to results infinitely higher *than [*285] any thing dependent upon a mere criticism upon forms of pleading. It involves this issue, so important to society, namely. How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office ; or how far, under the obligation of a supposed duty to arraign such men either at the bar of their immediate superiors or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity ; how far that law, designed for the protection of all, has placed a certain class of citizens without the pale of its protection ? The necessity for an exclusion like this, it will be admitted by all, must indeed be very strong to justify it ; it will never be recognized for trivial reasons, much less upon those that may be simulated or unworthy. If we look to the position of men in common life, we see the law drawing providently around them every security for their safety and their peace. It not only forbids the imputation to an individual of acts which are criminal, and would subject him to penal infliction ; but, regarding man as a sympathetic and social creature, it will sometimes take cognizance of injuries affecting him exclusively in that character. It will accordingly give a claim to redress to him who shall be charged with what is calculated to exclude him from social intercourse ; as, for instance, with being the subject of an infectious, loathsome, and incurable disease. The principle of the law always implying injury, wherever the object or effect is the exposure of the accused to criminal punishment or to degradation in society. These guardian provisions of the law, designed, as we have said, for the security and peace of persons in the ordinary walks of private life, appear in some respects to be extended still further in relation to persons invested with official trusts. Thus, it is said that words not otherwise actionable, may form the basis of an action when spoken of a party in respect of his office, profession, or business. *Aston v. Blagrove*, Strange, 617, and 2 *Ld. Raym.* 1369. Again, in *Lumby v. Allday*, 1 *Crompt. & Jerv.* 301, where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle

embraces all temporal offices of profit or trust, without limitation; 1 Starkie on Slander, 124.

With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated libel, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion. *Rex v. Beare*, 1 *Ld. Raym.* 414. It follows, there-

fore, that actions may be maintained for defamatory words [* 286] published * in writing or in print, which would not have been actionable if spoken. Thus, to publish of a man in writing that he had the itch and smelt of brimstone, has been held to be a libel. Per Wilmot, C. J., in *Villers v. Mousley*, 2 *Wils.* 403. In *Cropp v. Tilney*, 3 *Salk.* 226; Holt, C. J., thus lays down the law: "That scandalous matter is not necessary to make a libel; it is enough if the defendant induce a bad opinion to be had of the plaintiff, or make him contemptible or ridiculous." And Bayley, J., declares, in *McGregor v. Thwaites*, 3 *Barn. & Cres.* 33, that "an action is maintainable for slander either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule." To the same effect are the decisions in 6 *Bingh.* 409; *The Archbishop of Tuam v. Robeson*, 5 *Bingh.* 17; and in 4 *Taunt.* 355, *Thorley v. Lord Kerry*. In every instance of slander, either verbal or written, malice is an essential ingredient; it must in either be expressly or substantially averred in the pleadings; and whenever thus substantially averred, and the language, either written or spoken, is proved as laid, the law will infer malice until the proof, in the event of denial, be overthrown, or the language itself be satisfactorily explained. The defence of the defendants in error, the defendants likewise in the circuit court, is rested upon grounds forming, it is said, an established exception to the rule in ordinary actions for libel; grounds on which the decision of the circuit court is defended in having excluded from the jury, under the declarations in these cases, the writings charged in them as libellous. These writings were offered as evidence of express malice in the defendants. The exception relied on belongs to a class which, in the elementary treatises, and in the decisions upon libel and slander, have been denominated privileged communications or publications. We will consider, in the first place, the peculiar character of such communications, and the extent of their influence upon words or writings as to which, apart from that char-

acter, the law will imply malice. Secondly, we will examine the burden or obligation imposed by the law upon the party complaining to remove presumptions which might seem to be justified by the occasion of such communications, and to develop their true nature. And lastly, we will compare the requirements of the law with the character of the publication before us, and with the proceedings of the circuit court in reference thereto. The exceptions found in the treatises and decisions before alluded to are such as the following: 1. Whenever the author and publisher of the alleged slander acted in the *bonâ fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested. *2. Any [* 287] thing said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the house of commons, to hear and examine grievances.

But the term "exceptions," as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actors or transactions placed above the cognizance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti*; and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well defined qualifications. It properly signifies this, and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. Thus, in the case of *Cockayne v. Hodgkisson*, 5 Car. & Pa. 543, we find it declared by Parke, Baron: "That every wilful and unauthorized publication injurious to the character of another is a libel; but where the writer

is acting on any duty, legal or moral, towards the person to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer be actuated by malice." So in *Wright v. Woodgate*, 2 Crompton, Meeson & Roscoe, 573, it is said: "A privileged communication means nothing more than that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact; but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it." In regard to the second example mentioned, namely, that of a master giving the character of a servant, although this is a privileged communication, it is said by Lord Mansfield in *Weatherstone v. Hawkins*, 1 T. R. 110, and by Parke, J., in *Child v. Affleck*, 9 Barn. & Cres. 406, that if express malice be shown, the master will not be excused. And the result of these authorities, with many others

which bear upon this head is this, that if the conduct of the [*288] defendant entirely consists * of an answer to an inquiry, the absence of malice will be presumed, unless the plaintiff produces evidence of malice; but if a master unasked, and officiously, gives a bad character to a servant, or if his answer be attended with circumstances from which malice may be inferred, it will be a question for the jury to determine, whether he acted *bonâ fide* or with malice.

With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action of slander without proof of express malice; for it is said that it would be matter of public inconvenience, and would deter persons from preferring their complaints against offenders, if words spoken in the course of their giving or preferring their complaint should be deemed actionable; per Lord Eldon in *Johnson v. Evans*, 3 Esp. 32, and in the case of *Hodgson v. Scarlett*, 1 Barn. & Ald. 247, it is said by Holroyd, J., speaking of the words of counsel in the argument of a cause: "If they be fair comments upon the evidence, and relevant to the matter in issue, then, unless malice be shown, the occasion justifies them. If however, it be proved that they were not spoken *bonâ fide*, or express malice be shown, then they may be actionable." Abbot, J., in the same case, remarks: "I am of opinion that no action can be maintained unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable." In relation to proceedings in courts of justice, it has been strongly questioned whether

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under all circumstances, a publication of a full report of such proceedings will constitute a defence in an action for a libel. In the case of *Curry v. Walter*, 1 Bos. & Pul. 525, it was held that a true report of what passed in a court of justice was not actionable. The same was said by Lord Ellenborough in *Rex v. Fisher*, 2 Camp. 563; but this same judge in *Rex v. Creevey*, 1 M. & S. 273, and Bayley, J., in *Rex v. Carlisle*, 3 Barn. & Ald. 167, dissented from this doctrine as laid down in *Curry v. Walter*, observing that it must be understood with very great limitations; and by Tindal, C. J., in the case of *Delegal v. Highly*, 3 Bing. N. C. 950, it is said "to be an established principle upon which the privilege of publishing the report of any judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceedings." So a publication of the result of the evidence is not privileged; the evidence itself must be published. Neither is a publication of a counsel's speech unaccompanied by the evidence. *Lewis v. Walter*, 4 Barn. & Ald. 605; *Flint v. Pike*, 4 Barn. & Cress. 473.

Publications duly made in the ordinary course of parliamentary proceedings have been ruled to be privileged, and therefore not actionable. As where a false and scandalous libel was contained in "a petition which the defendant caused to be [* 289] printed and delivered to the members of the committee appointed by the house of commons to hear and examine grievances, it was held not to be actionable. Such appears to be the doctrine ruled in *Lake v. King*, 1 Saund. 131; and the reason there assigned for this doctrine is, that the libel was in the order and course of proceedings in the parliament, which is a court. The above case does certainly put the example of a privileged communication more broadly than it has been done by other authorities, and it seems difficult, from its very comprehensive language, to avoid the conclusion, that there might be instances of privilege which could not be reached even by the clearest proof of express malice. The point however, appearing to be ruled by that case, is so much in conflict with the current of authorities going to maintain the position that express malice cannot be shielded by any judicial forms, that the weight and number of these authorities should not, it is thought, be controlled and even destroyed by the influence of a single and seemingly anomalous decision. The decision of *Lake v. King* should rather yield to the concurring opinions of numerous and enlightened minds, resting as they do upon obvious principles of reason and justice. The exposition of the English law of libel given by Chan-

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cellor Kent in the second volume of his Commentaries, part 4th, p. 22, we regard as strictly coincident with reason as it is with the modern adjudications of the courts. That law is stated by Chancellor Kent, citing particularly the authority of Best, J., in the case of *Fairman v. Ives*, 5 Barn. & Ald. 642, to the following effect: "That petitions to the king, or to parliament, or to the secretary of war, for redress of any grievance, are privileged communications, and not actionable libels, provided the privilege is not abused. But if it appear that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies." It is the undoubted right, we know, of every citizen to institute criminal prosecutions, or to exhibit criminal charges before the courts of the country; and such prosecutions are as much the regular and appropriate modes of proceeding as the petition is the appropriate proceeding before parliament; yet it never was denied, that a prosecution with malice, and without probable cause, was just foundation of an action, though such prosecution was instituted in the appropriate court, and carried on with every formality known to the law. The parliament, it is said, is a court, and it is difficult to perceive how malicious and groundless prosecutions before it can be placed on a ground of greater impunity than they can occupy in another appropriate forum. The case of *Lake v. King*, therefore, interpreted by the known principles of the law of libel, would extend the privilege of the defendant no further than to require as to him proof of actual malice. A different interpretation would establish, as to such a case, a rule that is perfectly [*290] anomalous, and *depending upon no reason which is applicable to other cases of privilege.

By able judges of our own country, the law of libel has been expounded in perfect concurrence with the doctrine given by Chancellor Kent. Thus, in the case of *The Commonwealth v. Clap*, 4 Mass. 169, it is said by Parsons, C. J.: "That a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with honest intentions of giving information, and not maliciously or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws. For the same reason,

the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence dangerous to the people, and deserves punishment, because the people may be deceived, and reject their best citizens, to their great injury, and, it may be, to the loss of their liberties. The publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offence against law on sound principles," &c.

In the case of *Bodwell v. Osgood*, 3 Pick. 379, it was ruled, that a false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel, and the question of malice is to be determined by the jury. The court in this last case say, page 384: "It may be admitted, that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection, and that the occasion of the publication would prevent the legal inference of malice." The court proceed further to remark, page 385: "It has been argued, that the jury should have been instructed that the application to a tribunal competent to redress the supposed grievance, was *prima facie* evidence that the defendant acted fairly, and that the burden of proof was on the plaintiff to remove the presumption. The judge was not requested thus to instruct the jury. He did, however, instruct them that the burden of proof was on the plaintiff to satisfy them that the libel was malicious, and that, if the plaintiff did not prove the malice beyond any reasonable doubt, that doubt should be in favor of the defendant."

We have thus taken a view of the authorities which treat of the doctrines of slander and libel, and have considered those authorities *particularly with reference to the distinction they [*291] establish between ordinary instances of slander, written and unwritten, and those which have been styled privileged communications; the peculiar character of which is said to exempt them from inferences which the law has created with respect to those cases that do not partake of that character. Our examination, extended as it may seem to have been, has been called for by the importance of a subject most intimately connected with the rights and happiness of individuals, as it is with the quiet and good order of society. The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto. 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author

and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that, in every case of a proceeding like those just enumerated, falsehood, and the absence of probable cause, will amount to proof of malice.

The next and the only remaining question necessary to be considered in these cases, is that which relates to the rulings of [*292] the *court below, excluding the publication declared upon as a libel from going to the jury in connection with other evidence to establish the existence of malice. We forbear any remark upon the intrinsic character of the injury complained of, or upon the extent to which it may have been made out. These are matters not properly before us. But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. The jury, and the jury alone, were to determine whether this malice did or did not mark the publication. It would appear difficult *à priori* to imagine how it would be possi-

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ble to appreciate a fact whilst that fact was kept entirely concealed and out of view. This question, however, need not at the present time be reasoned by the court; it has, by numerous adjudications, been placed beyond doubt or controversy. Indeed, in the very many cases that are applicable to this question, they almost, without an exception, concur in the rule, that the question of malice is to be submitted to the jury upon the face of the libel or publication itself. We refer for this position to *Wright v. Woodgate*, 2 Crompton, Mees. & Ros. 573; to *Fairman v. Ives*, 5 Barn. & Ald. 642; *Robinson v. May*, 2 Smith, 3; *Flint v. Pike*, 4 Barn. & Cres. 484, per Little-*dale, J.*; *Ib.* 247, *Bromage v. Prosser*; *Blake v. Pilford*, 1 Mood. & Rob, 198; *Parmiter v. Coupland*, 6 Mees. & Welsby, 105; *Thompson v. Shackell*, 1 Moo. & Mal. 187. Other cases might be adduced to the same point.

Upon the whole, we consider the opinion of the circuit court in the several instructions given by it in these cases, to be erroneous. We therefore adjudge that its decision be reversed; that these causes be remanded to the said court, and that a *venire facias de novo* be awarded to try them in conformity with the principles herein laid down.

Ex parte, THE CITY BANK OF NEW ORLEANS, in the Matter of WILLIAM CHRISTY, Assignee of DANIEL T. WALDEN, a Bankrupt.

3 H. 292.

The bankrupt act of August 19, 1841, (5 Stats. at Large, 440,) conferred upon district courts of the United States power to determine the validity of a mortgage alleged to exist on the property of the bankrupt.

This court has not power, by a writ of prohibition, to revise the proceedings of the district court.

THE case is stated in the opinion of the court.

Wilde and Henderson, for the motion.

Crittenden, contra.

*STORY, J., delivered the opinion of the court.

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This is the case of an application on behalf of the City Bank of New Orleans to this court for a prohibition to be issued to the district court of the United States for the district of Louisiana, to prohibit it from further proceedings in a certain case in bankruptcy pending in the said court upon the petition of William Christy, assignee of Daniel T. Walden, a bankrupt. The suggestions for the writ state at large the whole proceedings before the district court, and contain allegations of some other facts, which either do not appear at

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all upon the face of those proceedings, or qualify or contradict some of the statements contained therein. So far as respects these allegations of facts, not so found in the proceedings of the district court, we are not, upon the present occasion, at liberty to entertain any consideration thereof for the purpose of examination or decision, as it would be an exercise of original jurisdiction on the part of this court not confided to us by law. The application for the prohibition is made upon the ground that the district court has transcended its jurisdiction in entertaining those proceedings; and whether it has or not must depend, not upon facts stated *dehors* the record, but upon those stated in the record, upon which the district court was called to act, and by which alone it could regulate its judgment. Other matters, whether going to oust the jurisdiction of the court, or to establish the want of merits in the case of the plaintiff, constitute properly a defence to the suit, to be propounded for the consideration of the district court by suitable pleadings, supported by suitable [*309] *proofs, and cannot be admitted here to displace the right of the district court to entertain the suit.

Let us then see what is the nature of the case originally presented to the district court. It is founded upon a petition of William Christy, as assignee of Daniel T. Walden, a bankrupt, in which he states, that the bankrupt, at the time of his filing his schedule of property and surrendering it to his creditors, was in possession of a large amount of real estate, described in the petition, situate in the city of New Orleans, which was to be administered and disposed of in bankruptcy; the bankrupt having applied to the court for the benefit of the bankrupt act. It further states, that the City Bank of New Orleans, claiming to be a creditor of the bankrupt, and to have a mortgage on the aforesaid property, the said corporation being a schedule creditor, being a party to the proceedings in bankruptcy, and being fully aware of the pendency of the same proceedings, did proceed to the seizure of the said property, and did prosecute the said seizure to a sale of the same property, the same being put up and offered for sale at public auction by the sheriff of the state district court, on or about the 27th of June, 1842; and it was by the said sheriff declared to be struck off to the said City Bank, notwithstanding the remonstrances of the said assignee, and his demands to have the same delivered up to him for the benefit of all the creditors of the bankrupt. It further avers, that the same property was illegally offered for sale, and that it is itself a nullity, and conferred no title on the said City Bank; that the sale was a fraud upon the bankrupt act; that the City Bank attempted thereby to obtain an illegal preference and priority over the other creditors of the bank-

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rupt, and that the property was sold at two thirds only of its estimated value; that the City Bank had never delegated to any person the authority to bid off the same to the said bank at the sale; and that the previous formalities required by law for the sale were not complied with, and that the property had been illegally advertised and appraised. It further avers, that the bankrupt, long prior to his bankruptcy, was contesting the debt claimed by the said bank; and contending that the said debt was not owing by him, and the said property was not bound thereby. It further avers, that the said debt is void for usury, on the part of the said bank in making the loan, the same not having been made in money, but that it was received as at par in bonds of the Municipality No. 2, which were then at depreciation at from twenty to twenty-five per cent., at their real current market value; and that the said bank had no authority to make the said contract, or to accept or execute the mortgage given by the bankrupt, and that the contract and mortgage are utterly void, and should be so decreed by the court.

The prayer of the petition is, that the sheriff's adjudication of the said property may be declared null and void, and that the said property may be adjudged to form part of the bankruptcy, and given up * to the petitioner, to be by him administered and [* 310] disposed of in the said bankruptcy, and according to law; that the said debt and mortgage may be decreed to be null and void, and the estate of the said bankrupt discharged from the payment thereof; and that if the said adjudication shall be held valid, and the debt and mortgage maintained by the court, then that the amount of the said adjudication may be ordered to be paid over by the said bank to the petitioner, to be accounted for and distributed by him according to law in the course of the settlement of the bankrupt's estate, and for all general and equitable relief in the premises.

To this petition the bank, by way of answer, pleaded various pleas: 1. That the district court had no jurisdiction to decide upon the premises in the petition. 2. That the subject had already become *res judicata* in two suits of D. T. Walden v. The City Bank, and The City Bank v. D. T. Walden, in the state courts, and by the district court upon the petition of D. T. Walden for an injunction, (not stating the nature or subject-matters of such suits, so as to ascertain the exact matters therein in controversy.) 3. That the petition contained inconsistent demands, namely, that the sale be set aside, and that the proceeds of the sale be decreed to the petitioner; and 4. That the mortgages to the bank were valid upon adequate considerations; that the order of seizure and sale were duly granted, and the sale

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duly made with all legal formalities, and the property adjudicated to the bank; that the price of the adjudication was retained by the bank to satisfy the said mortgages, and that the bank became and were the lawful owners of the property. The pleas concluded with a denial of all the allegations in the petition, and prayed that the issues in fact involved in the petition be tried by a jury. It is unnecessary for us to consider whether such a mode of pleading is allowable in any proceedings in equity, whether they are summary or plenary.

Upon this state of the pleadings the petitioner took exceptions to the answer of the bank, and three questions were adjourned into the circuit court for its decision. To these questions the circuit court returned the following answers.

[*295] “In answer to the questions adjourned into this court by the district court for the said district, it is ordered that the following answers be certified to the district court in bankruptcy, as the opinion of the court thereupon:—

“First. That the said district court has, under the statute of bankruptcy, full and ample jurisdiction of all questions arising under the petition of William Christy, assignee of Walden, to try, adjudge, decree, and determine the same between the parties thereto.

“Secondly. That the sale made of the mortgaged property, under the seizure and sale ordered by the district court of the State of Louisiana, is void, and that the district court of the United States should by its decree declare it void in the suit; and that said last-mentioned court has full power and authority to try and determine the validity of said mortgages, and if proved upon the trial void according to the laws of Louisiana, to make a decree accordingly, and order a sale of the property therein contained for the benefit of the several creditors of the bankrupt; but if upon proof said mortgages shall be sustained and adjudged valid, a decree should be rendered in favor of the mortgagees, condemning to sale all their interests, rights, and title therein, and all the interest, right, and title of the bankrupt and all the general creditors, in the hands of the assignee, and the rights and title of the assignee also; and by the order of sale the marshal be directed to pay over to the mortgagees, after deducting the per cent. for his commissions and all the legal costs of the suit, the amount of their claim, if the proceeds of the sale amount to so much, and the balance, if any, to pay over to the assignee; and that by such decree the assignee be ordered to make proper title and conveyance to the purchaser or purchasers, upon the full payment of the purchase-money, and a reasonable compensation

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to the assignee for making such conveyance, to be determined and settled by the judge of the district court, should the purchaser or purchasers and the assignee disagree as to the amount.

“Thirdly. The second and alternative prayer in the petition of the assignee, asking the payment to him of the whole amount of the proceeds of the former sale of the mortgaged property, being inconsistent with the opinion of the court in the second point, will therefore be disregarded on the trial by the district court.”

Subsequently, the assignee filed a supplemental or amended petition in the district court, stating the matters contained in the original petition more fully and at large, with more precise averments, and mainly relying thereon; and alleging, among other things, that the City Bank became a party to the proceedings in bankruptcy; and by a subsequent amendment, or supplemental allegation, the assignee averred that the bank became a party to the proceedings in bankruptcy, first, by operation of law, the bank being, at the time of the bankruptcy, mortgage creditors of the bankrupt, and named in his schedule; secondly, by their own act, having filed a petition in the court, in September, 1842, praying that the demand of the assignee * for the postponement of the sale of certain prop- [* 311] erty be disregarded, that their privileges be recognized, and that the property be sold under an order of the court for cash; and that the court had since refused leave to the bank to withdraw and discontinue the latter application and petition.

To the supplemental and amended petition the bank put in an answer or plea, denying the jurisdiction of the district court to take cognizance thereof, and insisting that they had never proved their debt in bankruptcy, but had prosecuted their remedy in the state courts against the mortgaged property, relying upon their mortgage as a lien wholly exempted from the operation of the bankruptcy by the express terms of the bankrupt act; that the district court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under the act of congress, ought not to take cognizance of the petition and supplemental petition, inasmuch as all jurisdiction over the premises is by law vested in, and of right belongs to the circuit court of the United States for the eastern district of Louisiana, holding jurisdiction in equity, and proceeding according to the forms and principles of chancery as prescribed by law, or to the district court of the United States, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity brought by an assignee against any person claiming an adverse interest, which courts are competent to entertain the suit of the petitioner and grant him the relief prayed for, if by law entitled to

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the same, and not this court; and the bank, therefore, prayed the said petition and supplemental petition to be dismissed for want of jurisdiction.

The district court affirmed its jurisdiction, considering that the matters of the plea had been already determined by the decree of the circuit court already referred to, and overruled the plea, and ordered the bank to answer to the merits of the cause.

It is at this stage of the proceedings, so far as the record before us enables us to see, that the motion for the prohibition has been brought before this court for consideration and decision. Upon the argument, the principal questions which have been discussed are, first, what is the true nature and extent of the jurisdiction of the district court sitting in bankruptcy? secondly, whether, if the district court has exceeded its jurisdiction in the present case, a writ of prohibition lies from this court to that court to stay further proceedings? Each of these questions is of great importance, and the first in an especial manner having given rise to some diversity of opinion in the different circuits, and lying at the foundation of all the proceedings in bankruptcy, is essential to be decided in order to a safe and just administration of justice under the bankrupt act.

In the first place, then, as to the jurisdiction of the district court in matters of bankruptcy. Independent of the bankrupt act of 1841, c. 9, the district courts of the United States possess [* 312] no * equity jurisdiction whatsoever; for the previous legislation of congress conferred no such authority upon them. Whatever jurisdiction, therefore, they now possess, is wholly derived from that act. And, as we shall presently see, the jurisdiction thus conferred is to be exercised by that court summarily in the nature of summary proceedings in equity.

The obvious design of the bankrupt act of 1841, c. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effectual control. The 10th section of the act declares that, in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors, and that such distribution of the assets, so far as can be done consistently with the

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rights of third persons having adverse claims thereto, shall be made as often as once in six months ; and that all the proceedings in bankruptcy in each case, if practicable, shall be finally adjusted, settled, and brought to a close by the court, within two years after the decree declaring the bankruptcy. By another section of the act, (§ 3,) the assignee is vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the estate and property of the bankrupt, of every name and nature, and to sue for and defend the same, subject to the orders and directions of the court, as fully as the bankrupt might before his bankruptcy. By another section, (§ 9,) all sales, transfers, and other conveyances of the bankrupt's property, and rights of property, are required to be made by the assignee at such times and in such manner as shall be ordered and appointed by the court in bankruptcy. By another section, (§ 11,) the assignee is clothed with full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, and to tender a due performance thereof, and to compound any debts, or other claims, or securities due or belonging to the estate of the bankrupt.

From this brief review of these enactments, it is manifest that the purposes so essential to the just operation of the bankrupt system could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them ; and it would be a matter of extreme surprise if, when congress had thus required the end, * they should at the same time have withheld the means by [* 313] which alone it could be successfully reached. Accordingly we find that, by the 6th section of the act, it is expressly provided, "that the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy, the said jurisdiction to be exercised summarily in the nature of summary proceedings in equity ; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined ; and for this purpose the circuit court of such district shall also be deemed always open." If the section had stopped here, there could have been no reasonable ground to doubt that it reached all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, since they are matters arising under the act, and are necessarily involved in the due

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administration and settlement of the bankrupt's estate. In this respect the language of the act seems to have been borrowed from the language of the constitution, in which the judicial power is declared to extend to cases arising under the constitution, laws, or treaties of the United States. But the section does not stop here, but in order to avoid all doubt it goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language. The section further declares: "And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." This last clause is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated, upon the known maxim, often incorrectly applied, *expressio unius est exclusio alterius*. The 8th section of the act further illustrates this subject. It is there provided, "that the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee touching any property or rights of property of such bankrupt, transferable to or vested [*314] in such *assignee." Now, this clause certainly supposes either that the district court, in virtue of the 6th section above cited, is already in full possession of the jurisdiction, in the class of cases here mentioned, at least so far as they are of an equitable nature, and then confers the like concurrent jurisdiction on the circuit court, or it intends to confer on both courts a coextensive authority over that very class of cases, and thereby demonstrates that congress did not intend to limit the jurisdiction of the district court to the classes of cases specifically enumerated in the 6th section, but to bring within its reach all adverse claims. Of course, in whichever court such adverse suit should be first brought, that would give such court full jurisdiction thereof, to the exclusion of the other, but in no shape whatsoever can this clause be construed otherwise

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to abridge the exclusive jurisdiction of the district court over all other "matters and proceedings in bankruptcy arising under the act," or over "all acts, and matters and things to be done under and in virtue of the bankruptcy."

One ground urged in the declinatory plea of the bank to the supplemental petition, and also in the argument here, is, that the district court would have had jurisdiction in equity over the present case, if the suit had been by a formal bill and other plenary proceedings, according to the common course of such suits in the circuit court, but that it has no right to sustain the suit in its present form of a summary proceeding in equity. Now, without stopping to consider whether the petition of the assignee in the present case is not in substance, and for all useful purposes, a bill in equity, it is clear that the suggestion has no foundation whatsoever in the language or objects of the 6th or 8th sections of the bankrupt act. There is no provision in the former section authorizing or requiring the district court to proceed in equity otherwise than "summarily in the nature of summary proceedings in equity;" and that court is by the same section clothed with full power and authority, and, indeed, it is made its duty, "from time to time to prescribe suitable rules and regulations and forms of proceedings in all matters in bankruptcy," subject to the revision of the circuit court; and it is added: "And in all such rules and regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by "the public at large." If any inference is to be drawn from this language, it is not that the district court should in any case proceed by plenary proceedings in equity in cases of bankruptcy, but that the circuit court should, by the interposition of its revising power, aid in the suppression of any such plenary proceedings, if they should be attempted therein. The manifest object of the act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate, in the most expeditious manner, * consistent with jus- [* 315] tice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits.

Another ground of objection insisted on in the argument is, that the language of the 6th section, where it refers to "any creditor or creditors who shall claim any debt or demand under the bankruptcy," is exclusively limited to such creditors as come in and prove their debts under the bankruptcy, and does not apply to creditors who claim adversely thereto. If this argument were well founded, it

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would be sufficient to say that the case would then fall within the concurrent jurisdiction given by the 8th section already cited, and therefore not avail for the City Bank. But we do not so interpret the language. When creditors are spoken of "who claim a debt or demand under the bankruptcy," we understand the meaning to be that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might elect, whether they have a security by way of pledge or mortgage therefor, or not. If they have a pledge or mortgage therefor, they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto*, and to prove for the residue; or, on the other hand, the assignee may contest their claims in the court, or seek to ascertain the true amount thereof, and have the residue of the property, after satisfying their claims, applied for the benefit of the other creditors. Still, the debts or demands are in either view debts or demands under the bankruptcy, and they are required by the bankrupt act to be included by the bankrupt in the list of the debts due to his creditors when he applies for the benefit of the act; so that there is nothing in the language or intent of the 6th section to justify the conclusion which the argument seeks to arrive at. The 5th section of the bankrupt act is framed *diverso intuitu*. It does not speak of creditors who shall claim any debt or demand under the bankruptcy, but it uses other qualifying language. The words are: "All creditors coming in and proving their debts under such bankruptcy in the manner hereinafter prescribed, the same being *bonâ fide* debts, shall be entitled to share in the bankrupt's property and effects *pro rata*, &c.; and no creditor or other person coming in or proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt." But this provision by no means interferes with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security *pro tanto* for his debt, if he elects so to do, or with the rights [* 316] of the assignee to redeem the * same, or otherwise to contest the validity of the debt or security under the bankruptcy.

It is also suggested that the proviso of the 2d section of the act declares "that nothing in this act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which

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may not be inconsistent with the provisions of the 2d and 5th sections of this act," and that thereby such liens, mortgages, and other securities are saved from the operation of the bankrupt act, and by inference from the jurisdiction of the district court. But we are of opinion that the inference thus attempted to be drawn is not justified by the premises. There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, so far as they are valid by the state laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the courts of the United States as they would be in the state courts. The district court, sitting in bankruptcy, is bound to respect and protect them. But this does not and cannot interfere with the jurisdiction and right of the district court to inquire into and ascertain the validity and extent of such liens, mortgages, and other securities, and to grant the same remedial justice and relief to all the parties interested therein as the state courts might or ought to grant. If the argument has any force, it would go equally to establish that no court of the United States, neither the circuit court nor the district court, could entertain any jurisdiction over any such cases, but that they exclusively belong to the jurisdiction of the state courts. Such a conclusion would be at war with the whole theory and practice under the judicial power given by the constitution and laws of the United States. The rights and the remedies in such cases are entirely distinct. While the former are to be fully recognized in all courts, the latter belong to the *lex fori*, and are within the competency of the national courts equally with the state courts.

Let us sift this argument a little more in detail. The 8th section of the bankrupt act (as we have already seen) confers on the circuit court concurrent jurisdiction with the district court of all suits at law and in equity brought by the assignee against any person claiming an adverse interest, and *e converso* by such person against the assignee. Now, the argument at the bar supposes that a creditor having any lien, mortgage, or other security, falls within the category here described as having an adverse interest. Assuming this to be true, (on which we give no opinion; and the clause certainly does include persons claiming by titles paramount and not under the bankrupt,) still, it must be admitted that, under the 8th section, a bill in equity may be brought by or against such creditor in the circuit court to redeem or foreclose, or to enforce, or to set aside

*such a lien, mortgage, or other security? If it can be, [* 317] then the lien, mortgage, or other security is not saved from the cognizance of the circuit court having jurisdiction in bankruptcy,

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but the most ample remedies lie there; and although the rights of such creditors are to be protected, they are subject to the entire examination and decision of the court as much as they would be if brought before the court in the exercise of its ordinary jurisdiction. If, then, the jurisdiction over such liens, mortgages, and securities exists in the circuit court, it follows, from the very words of the bankrupt act, that the district court has a concurrent jurisdiction to the same extent and with the same powers.

But it is objected that the jurisdiction of the district court is summary in equity and without appeal to any higher court. This we readily admit. But this was a matter for the consideration of congress in framing the act. Congress possess the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States, and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by congress in such a manner as shall in their judgment best promote the public convenience and the true interests of the citizens. Because the proceedings are to be in the nature of summary proceedings in equity, it by no means follows that they are not entirely consistent with the principles of justice, and adapted to promote the interest as well as the convenience of all suitors. Because there is no appeal given, it by no means follows that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments either of the district or circuit court in criminal cases; and yet, within the cognizance of one or both of those courts are all crimes and offences against the United States, from those which are capital down to the lowest misdemeanors, affecting the liberty and the property of the citizens. And yet there can be no doubt that this denial of appellate jurisdiction is founded in a wise protective public policy. The same reasoning would apply to the appellate jurisdiction from the decrees and judgments of the circuit court, which are limited to cases above \$2,000, and cases below that sum embrace a large proportion of the business of that court.

But, in the present instance, the public policy of confiding the whole jurisdiction to the district court, without appeal in ordinary cases, requires no elaborate argument for its vindication. The district judges are presumed to be entirely competent to all the duties imposed upon them by the bankrupt act. In cases of doubt or difficulty, the judges have full authority given to them to adjourn any questions into the circuit court for a final decision. That very course was adopted in the present case. In the next place, in one class of cases, that of adverse interests between the assignee and third persons, either party is at liberty to institute original proceedings in the

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circuit court, if a prior suit has not been brought therefor in * the district court. So that here the act has afforded effectual means to have the aid and assistance of the judge of the circuit court wherever it may seem to be either expedient or necessary to resolve any questions of importance or difficulty, and it has also secured to parties having an adverse interest a right, at their election, to proceed in the district or the circuit court for any remedial justice which their case may require. On the other hand, the avowed policy of the bankrupt act, that of insuring a speedy administration and distribution of the bankrupt's effects, would (as has been already suggested) be greatly retarded, if not utterly defeated, by the delays necessarily incident to regular and plenary proceedings in equity in the district court, or by allowing appeals from the district court to the circuit court in all matters arising under the bankruptcy.

It is further objected that, if the jurisdiction of the district court is as broad and comprehensive as the terms of the act justify, according to the interpretation here insisted on, it operates or may operate to suspend or control all proceedings in the state courts either then pending or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that, under the provisions of the 6th section of the act, the district court does possess full jurisdiction to suspend or control such proceedings in the state courts, not by acting on the courts, over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity upon due application made by the assignee, and a proper case being laid before the court, requiring such interference. Such a course is very familiar in courts of chancery, in cases where a creditors' bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts, for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were without doubt, in the contemplation of congress, as indispensable to the practical working of the bankrupt system. But because the district court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equita-

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ble interference of the district court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of any fraud or in-
[* 319] justice on the part of the plaintiffs in those * suits. The act itself contemplates that such suits may be prosecuted and further proceedings had in the state courts; for the assignee is by the 3d section authorized to sue for and defend the property vested in him under the bankruptcy, "subject to the orders and directions of the district court," "and all suits at law and in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and manner and with the same effect as they might have been by the bankrupt." So that here the prosecution or defence of any such suits in the state courts is obviously intended to be placed under the discretionary authority of the district court. And in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the state courts at the time of the bankruptcy, ever have been interfered with, and never, unless some equity intervened which required the interposition of the district court to sustain or protect it.

It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the district court to prevent irreparable injury, or loss, or waste, of the assets, without adverting to the case at bar, where, upon the allegations in the petition and supplemental petition, the creditors of the bankrupt are attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff, in an illegal and irregular manner, thereby sacrificing the interest of the other creditors under the bankruptcy. Let us put the case of numerous suits pending, or to be brought in the state courts, upon different mortgages, by the mortgagees, upon various tracts of land and other property, some of the mortgages being upon the whole of the tracts of land or other property; some upon a part only thereof; some of them involving a conflict of independent titles; some of them involving questions as to the extinguishment, or satisfaction, or validity, of the debts; and some of them involving very doubtful questions as to the construction of the terms and extent of the conveyances. If all such suits may be brought by the separate mortgagees, in the different state tribunals, and the mortgagees cannot be compelled to join in, or to be made parties defendant to one single bill, (as is certainly the case in those States where general equity jurisdiction is not given to the state

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courts,) it is most obvious that, as each of the state tribunals may or must proceed upon the single case only before it, the most conflicting decisions may be made, and gross and irreparable injustice may be done to the other mortgagees, as well as to the general creditors under the bankruptcy. All this, however, is completely avoided by bringing the whole matters in controversy between all the mortgagees before the district or circuit court, making them all parties to the summary proceedings in equity, and thus enabling the court to marshal the rights, and priorities, and claims, of all the parties, and by a sale, and other proper proceedings, after satisfying * the just [* 320] claims of all the mortgagees, applying the residue of the assets, if any, for the benefit of the general creditors. Similar considerations would apply to other liens and securities, held by different parties in the same property, or furnishing grounds of conflict and controversy as to their respective rights and claims.

Besides, how is the bankrupt court or the assignee, in a great variety of cases of liens, mortgages, and other securities, to ascertain the just and full amount thereof, after the deduction of all payments and equitable set-offs, unless it can entertain a suit in equity for a discovery of the debts, and payments, and set-offs, and grant suitable relief in the premises? The bankrupt is not, in his schedule, bound to specify them; and if he did *non constat* that the other parties would admit their correctness, or that the general creditors would admit their validity and amount. The 11th section of the act gives the assignee full power and authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien, upon any property, and to tender a due performance of the conditions thereof. But how can this be effectually done, unless the bankrupt court and assignee can, by proceedings in that very court, ascertain what is the amount of such mortgage, or pledge, or deposit, or lien, and what acts are to be done as a performance of the mortgage, or pledge, or deposit, through the instrumentality of a suit in the nature of a summary proceeding in equity for a discovery and relief? If we are told that resort may be had to the state courts for redress, one answer is, that in some of the States no adequate jurisdiction exists in the state courts, since they are not clothed with general jurisdiction in equity. But a stronger and more conclusive answer, is, that congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six States, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the constitution, competent to all such purposes; and congress, by the

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act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do.

Let us look at another provision of the act already referred to, which declares: "That in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable." Now, here again, it may be repeated, that the end is required, and can it be doubted that adequate means to accomplish the end are intended to be given? Construing the language of the 6th section as we construe it, adequate means are given; construing it the other way, and it excludes the jurisdiction,

if not of the whole subject, at least of the most important [* 321] parts of * the system, and they are left solely to the cognizance of the tribunals of twenty-six different States, no one of which is bound by the acts of the others, or is under the control of the national courts. If it be admitted, (what cannot well be denied,) that the district court may order a sale of the property of the bankrupt, under this section, how can that sale be made safe to the purchasers until all claims thereon have been ascertained and adjusted? How can any distribution of the assets be made until all such claims are definitively liquidated? How can the proceedings be brought to a close at all, far less within the two years, unless all parties claiming an interest, adverse or otherwise, can be brought before the bankrupt court to assert and maintain them? Besides, independently of the delays which must necessarily be incident to a resort to state tribunals to adjust the matters and rights affected by or arising in bankruptcy, considering the vast number of cases pending in those courts, in the due administration of their own jurisprudence and laws, there could hardly fail to be a conflict in the decisions, as to the priority and extent of the various claims of the creditors, pursuing their remedies therein in distinct and independent suits, and, perhaps, also, in different state tribunals of coördinate jurisdiction. These are but a few of the cases which may be put to show the propriety, nay, the necessity, of the jurisdiction of the district court to the full extent of reaching all cases arising out of the bankrupt act.

The truth is, (as has been already asserted,) that in no other way could the bankrupt system be put into operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on, when the whole

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jurisdiction was confided to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens, and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such times and in such a manner as should best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to public as well as private interests, manifestly dictated to congress the propriety of vesting in the district court full and complete jurisdiction over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's estate; and it is accordingly, in our judgment, *designedly given by the 6th section of the act. In this [* 322] view of the matter, the district court has not exceeded its jurisdiction in entertaining the present suit, but it has full power and authority to proceed to the due adjudication thereof upon its merits.

This view of the subject disposes also of the other question made at the bar, whether this court has jurisdiction to issue a writ of prohibition to the district court in cases in bankruptcy, if it has exceeded its proper jurisdiction. As the district court has not exceeded its jurisdiction in the present case, the question is not absolutely necessary to be decided. But it may be proper to say, as the point has been fully argued, that we possess no revising power over the decrees of the district court sitting in bankruptcy; that the district court, in the present case, has not interfered with, or in any manner evaded or obstructed, the appellate authority of this court, by entertaining the present writ; and that we know of no case where this court is authorized to issue a writ of prohibition to the district court, except in the cases expressly provided for by the 13th section of the judiciary act of 1789, c. 20,¹ that is to say, where the district courts are "proceeding as courts of admiralty and maritime jurisdiction."

Upon the whole, the motion for a writ of prohibition is overruled.

CATRON, J. By the 14th section of the judiciary act, this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue

¹ 1 *Stats. at Large*, 80.

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no writ; that it has none to revise the proceedings of a bankrupt court is our unanimous opinion. So far we adjudge, and in this I concur. For further views, why the prohibition cannot issue, I refer to the conclusion of the principal opinion. But a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the bankrupt court. In this course I cannot concur; perhaps it is the result of timidity growing out of long established judicial habits in courts of error elsewhere, never to hazard an opinion where no case was before the court, and when that opinion might be justly arraigned as extrajudicial, and a mere *dictum* by courts and lawyers; be partly disregarded while I was living, and almost certainly be denounced as undue assumption when I was no more; a measure of disregard awarded with an unsparing hand, here and elsewhere, to the *dicta* of state judges under similar circumstances. And it is due to the occasion and to myself to say, that I have no doubt the *dicta* of this court will only be treated with becoming respect before the court itself, so long as some of the judges who concurred in them are present on the bench, and afterwards be openly rejected as no authority — as they are not.

The case standing in the district court of Louisiana will test it as well as another. The application for a prohibition was [*323] brought *before us at last term; then the late Mr. Justice Baldwin was here, and one other of the judges now present was then absent. Had the matter not then been laid over on advisement, and a decision been had adverse to our jurisdiction to award the writ, and an opinion been expressed by the majority of the judges then present, against the legality of the proceeding in the bankrupt court, declaring it void, and that in the state court valid, would the bankrupt court be bound to conform to such opinion? would it overrule the instructions given in the particular case by the circuit court on the questions adjourned, dismiss the petition of Christy, the assignee, and let the decree and sale foreclosing the mortgage made by the state courts, stand? Will the bankrupt court of Pennsylvania be bound, either judicially or in comity, by the opinion now given by a majority of the judges present, to overthrow that of Mr. Justice Baldwin in the case hereto appended; or is it bound to conform? Are the bankrupt courts in all the districts that have held the state proceedings on liens to be valid, and not subject to their supervision, now bound to suppress such proceedings on the suggestion of assignees that they were erroneous or inconvenient, regardless of proof, as was done in Louisiana, and thereby overhaul cases in great numbers supposed to be settled? Certainly not. This court has no power over the bankrupt courts, more than they have over this court;

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the bankrupt law has made them altogether independent, and their decrees as binding as ours, and as final. We have as little power to control them as the state courts have; they may concur with the reasoning of either, or neither, at discretion. I, therefore, think we should refrain from expressing any extrajudicial opinion on the present occasion; we did so in *Nelson v. Carland*, 1 How. 265, a case involving the constitutionality of the bankrupt law, and I then supposed most properly, by the majority of the court, who thought we had no jurisdiction; a more imposing application requiring an opinion could not have been presented, as twelve hundred cases depended on the decision of the district court of Missouri, which was opposed to the constitutionality of the law; and to revise it, the case was brought here. So, in *Dorr's application*, 3 How. 103, at the present term, for a writ of *habeas corpus*, the same course was pursued. That application and this are not distinguishable in principle; in neither had this court power to bring a case for judgment into it; there, and here, we held nothing was before us, or could be brought before us. With this course I would now content myself, was it not that by acquiescing in silence with the opinion of my brethren, I might be supposed to have agreed with them in the course pursued, and also in the views expressed in the affirmance of the jurisdiction exercised under the bankrupt law by the circuit court of eastern Louisiana, to both of which my opinion is adverse, and that most decidedly. The case presented to that court was this:—

* In 1839, Walden gave to the City Bank a mortgage to [*324] secure the payment of \$200,000 loaned him, on a plantation and town lots.

In 1840, he instituted a suit in the district court of the State, in New Orleans, to set the mortgage aside as void; a trial was had, and the court adjudged the mortgage valid; from this Walden appealed to the supreme court of Louisiana, and that court affirmed the judgment.

The bank then proceeded in the district court of the State to foreclose the mortgage, and on the 17th of May, 1842, an order of seizure and sale was made; and an actual seizure of the property was executed on the 19th of May. The sale took place on the 27th of June.

The property was sold by lots, after appraisement, in conformity to the laws of Louisiana, and the bank became the purchaser at the price of \$160,000.

That the sale was made in regular and due form, according to the modes of proceeding in the state courts, cannot be controverted.

On the 18th of June, 1842, Walden filed his petition for the bene-

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fit of the bankrupt law, and on the 18th of July was declared a bankrupt, and an assignee appointed. The \$200,000 was on Walden's creditor list, but the bank refused to prove its debt, and relied on the decree of foreclosure, and the force of its lien, by the mortgage.

Christy, the assignee, filed his petition in the bankrupt court, and as part of the proceeding in bankruptcy, to have the sale declared void. 1. Because it was made after Walden applied for the benefit of the bankrupt law. 2. Because the sale had been unfairly conducted. 3. Because the proceeding in the state court was erroneous. 4. Because the debt was affected with usury, and, therefore, the mortgage void originally, and should be so decreed by the bankrupt court.

The bank appeared, and pleaded to the jurisdiction of the bankrupt court; and relied on the proceedings of the state court as valid by answer. Exceptions were taken to this plea and answer, which were adjourned to the circuit court; there it was adjudged, and the district court instructed:—

1. That it had full and ample jurisdiction to try all the questions set forth in the petition of the assignee; and to try, adjudge, and determine the same between the parties.

2. That the seizure and sale of the state court were void, and that the district court of the United States do declare it void.

3. That the district court has full power and authority to try and determine the validity of the mortgage; and if proved on the trial void, to declare it so, and to make a decree ordering the property to be sold for the benefit of the creditors generally; but if found valid, the bank to have the benefit of its lien.

This decree pronounced void the judgment of the supreme court of Louisiana, affirming that of the inferior court declaring the mortgage valid, and not affected with usury; which was conclusive between Walden and the bank before the bankrupt law existed. 2. It declared void the decree and order of seizure made before Walden applied for the benefit of the act; and it declared void the sale. In short, it annulled all the judgments of the state courts, and assumed to extinguish the title acquired under them; and has extinguished in form and fact, if the views of a majority of my present brethren be correct, a title indisputable, according to the laws of Louisiana standing alone; this is manifest from the slightest examination of the facts, and laws applicable to them. On the 18th of July, the decree declaring Walden a bankrupt was passed; up to this date he might or might not be declared a bankrupt, either at his own instance, or that of the court; therefore he was a proper party before the state court until that time; afterwards he was rep-

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resented by his assignee ; his property was under execution when he was declared a bankrupt ; if he had then died, still, the duty of the officer would have been to sell ; the execution having commenced, a natural or civil death could not defeat it, as the property was in the custody of the law.

If it be true that this title is void, it follows every other is void where a sale has taken place after the defendant to the execution (issued by a state court) had applied for the benefit of the bankrupt law ; and this whether the execution was awarded in the form usual to courts of law, or by decree in a court of chancery, ordering a seizure and sale by force of the decree. Every sheriff, or commissioner in chancery, executing such writ or decree, must have been a trespasser ; and all persons taking under such sales deluded purchasers. In the eighth circuit there are very many such cases beyond doubt ; they are founded on my opinion, acting with the district judges, who fully concurred with me, that such sales were lawful, and the titles acquired under them valid. In two other circuits, at least, similar views have been entertained, and no doubt similar consequences have followed. It is therefore due to interests so extensive, affecting so many titles, that they should not be overthrown until a case calling for the authoritative adjudication of this court is presented involving them, and therefore these brief views have been expressed ; not on the jurisdiction of the bankrupt courts generally ; but on the precise facts presented as the grounds on which the prohibition was demanded.

On the force of the lien, and the remedy to enforce it, as a right excepted from the bankrupt law, I have said nothing, because my late brother Baldwin was called on to follow the decision given in Louisiana, and refused. As he decided under the responsibility of passing on men's rights, and from whose judgment there was no appeal, his opinion is judicial, and authoritative throughout his late circuit, whereas mine on the present occasion would be extrajudicial, * and therefore I append his instead of any I [* 326] may entertain individually.

In the foregoing opinion of CATRON, J., DANIEL, J., concurs.

Opinion of BALDWIN, J., adopted by CATRON, J., as a part of his dissenting opinion.

In the Matter of John Kerlin, a Bankrupt. Oct. 26, 1843.

On the 13th of May, 1843, the assignees of John Kerlin, a bankrupt, presented their petition to the judge of the district court for the eastern district of Pennsylvania, praying for an order, authoriz-

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ing them to sell certain real estate of the bankrupt, in Delaware county. On the face of the petition, it appeared that at the time of the decree of bankruptcy, the property was subjected to incumbrances amounting to \$14,800; that it had been sold by the sheriff of Delaware county on the 11th of May, 1843, for the sum of \$8,000, by virtue of proceedings issued by the court of common pleas of Delaware county, under one of the mortgages recorded before the decree of bankruptcy, but the purchaser had not complied with the terms of the sale. The assignee in bankruptcy contended that the sheriff could not make title to the premises, and under a decision of the circuit court in Louisiana, claimed the right to sell. The district judge (Randall) refused to grant the order, but at request of the parties, adjourned the question to the circuit court, where the following opinion was delivered by Baldwin, J.

The following questions have been certified by the district judge for the opinion of this court: —

“ 1. Does a sale by a sheriff after a decree of bankruptcy, by virtue of process issued on a judgment or mortgage, which was a lien on the property of the bankrupt before and at the time of the decree, divest the title of the assignee in bankruptcy ? ”

“ 2. In case of a sale made by the assignee under an order of the court, if the whole of the purchase-money is not sufficient to discharge the liens existing at the time of the decree, are the liens divested by such sale ? ”

The leading principle which has governed this court in the construction of the bankrupt act of 1841 has been to consider it as establishing a uniform law on the subject of bankruptcies, in the most comprehensive sense of the words as used in the constitution, in which there is no other restriction on the power of congress than that the laws shall be uniform throughout the United States. To make it so in its practical operation, it must be taken as it reads; its words must receive their appropriate meaning, with reference to the whole law, and the policy developed in its various provisions.

These constitute that system which it was intended to [*327] establish, * not by assuming that the design of the law was to adopt any preëxisting rules and principles found only in the former legislation of congress, or in other countries, and then to so apply it as to effectuate a supposed policy not apparent in the law itself, nor consistent with its language, the insertion of which into the system must make it operate according to the intention of other legislatures, and require a mode of construction which will do violence to the plainest terms used to denote and declare the policy and general principles which congress have actually established.

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That the act of 1841 is anomalous in its provisions, unlike any other known in any legislation here or elsewhere, cannot be doubted. In the great outlines as well as in the details of the system, we feel the exercise of an express plenary power, competent to act at its own unlimited discretion, (so that the action be uniform,) either by adopting or modifying some old system on the subject of bankruptcy, or prescribing a new one; the latter mode has seemed the better in the eye of the legislature, and the duty of the judicial department is to consider its intention, and to carry it into effect.

In applying this principle to the solution of the first question now submitted, there seems no difficulty as to the policy and intentions of the law from its unequivocal language, which, as we have heretofore held, contains an express prohibition to the judicial power, not to so construe any provision as to annul, destroy, or impair any lien, mortgage, or other security, on property which is valid by the laws of the States respectively, and not inconsistent with the 2d or 5th sections.

The validity of a mortgage or judgment is submitted to no other test than these—the laws of the States and these two sections; if they stand this scrutiny, the duty of the courts is imperative. The bankrupt act protects all valid judgments or mortgages against any construction which shall impair them, to the same extent as the constitution guards the obligation of contracts when attempted to be impaired by state laws. Having heretofore given this as, not the construction merely, but the inevitable result of language incapable of being mistaken in any fair reading of the last proviso in the 2d section, and stated the reasons therefor at large, it is not deemed either necessary or useful to now resume the investigation of that provision of the law, as no doubt was then or is now entertained of its meaning; see *Ex parte Dudley et al.*, Pennsylvania Law Journal, 302. If additional reasons could be requisite to elucidate this view of that proviso, they will be found in the 11th section, which is framed to meet its provisions — by authorizing the assignee, with the order of the court, to redeem and discharge any mortgage or lien upon any property of the bankrupt, though payable at a future day, and to tender performance of its conditions.

This authority to redeem and discharge a lien, presupposes its validity, that it cannot be impaired by any power of the court, and * that the assignee of the bankrupt could not take the [*328] property so bound before the lien was discharged, on any other terms than those on which it was held by the bankrupt himself, before any decree of bankruptcy had vested his rights in the assignee; else why should it have been deemed necessary to authorize

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him to redeem or discharge the lien, if it was not in full force as well after as before the petition or decree? Neither the proviso to the 2d or the 11th section discriminate between a lien existing before the petition filed or after it; both comprehend all liens existing at the time of the decree as burdens on the property, and contemplate the necessity of their payment in full, before any other creditor can come in upon it. The only fund for their payment being the assets of the bankrupt in the hands of the assignee, it is clear that the rights of those creditors who have liens are, and must be, paramount to any which accrue under the bankruptcy to the assignee or general creditor. When liens are paid, then the property which they bound becomes distributable by the assignee; if not paid, the rights of the lien creditor remaining incapable of being impaired by any authority conferred by the bankrupt act, stands perfect as if that act had not been passed; so that, if valid by the law of the State, and not inconsistent with the 2d or 5th sections of that law, they may, consequently be enforced by a sale or other process conformably to the existing laws of the State for enforcing liens, which no court can annul, destroy, or impair, by any proceeding in bankruptcy. On this subject, the principles established by the supreme court, in the case of *Bronson v. Kinzie*, are replete with the soundest rules of jurisprudence and constitutional law, and directly applicable to the question now under consideration, which is, in all respects, analogous to the one then before that court on the nature of the obligation, of the extent of the mortgage and the rights of the mortgagee; and the validity of the state law, which impaired his rights to enforce the payment of the mortgage money. In that case, the court declared that the obligation of the contract, the rights which the mortgagee acquired in the mortgage premises, depended on the then existing laws of the State, which "created and defined the legal and equitable obligation of the mortgage contract." 1 How. 315. That the constitution equally prohibits the impairing them by a state law, acting on the remedy or directly on the contract itself; "if it so changes the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests in it." 1 How. 316. "That it may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." 1 How. 317. "That the rights and remedies of mortgagor and mortgagee, by the law then in force, were a part of the law of the contract without any express agreement of the parties — they were annexed to the contract [* 329] * at the time it was made, and formed a part of it; and any

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subsequent law impairing the rights thus acquired, impairs the obligations which the contract imposed." 1 How. 319. And on these principles a state law, which incumbered the remedy of the mortgagee by conditions imposed after its obligation had attached, was null and void. In this case the question presented is, whether a court of the United States, sitting in bankruptcy, can, by any rule, order, or decree, impair the right of a creditor by mortgage or judgment, to enforce the payment of his debts by a sale of the property mortgaged or incumbered by the lien of a judgment, according to the provisions of the state laws. If the right and power to sell can be taken from the creditors and conferred on the assignee of a bankrupt, who is a debtor by a mortgage or judgment existing at the time of the decree of bankruptcy; if the validity of the liens, the time, and terms of sale, and the distribution of the proceeds, can, under the bankrupt law, be determined and regulated by a judge in a proceeding in bankruptcy, from which there can be no appeal, then the remedy for enforcing a mortgage or judgment is no longer annexed to the contract, or a part of it. The empty right still remains in the mortgagee, yet the remedy is taken from him by the assignee of his debtor. The final adjudication, and even his ultimate rights, and the mode of administering the remedy, is made dependent on the discretion of a judge, exercised by the summary proceedings prescribed by the bankrupt act, instead of the regular course of the law as administered in the courts of a State. For such a course, there is not only no warrant in the law, but it is a direct violation of the prohibition in the section, by so construing the law as to negative its express language, and taking from lien creditors, by mere judicial power, those very rights and remedies which are placed beyond its exercise, in terms positively forbidding it, in as plain and emphatic language as that in which the constitution declares that "no State shall pass any law impairing the obligation of contracts." The principles of the supreme court, in the case of *Bronson*, must be repudiated, before a judge can exercise a power, under the bankrupt act, which is forbidden to a State by the constitution. If either the obligation or the remedy is impaired, it matters not by whom it is done; no State has any power to do it; congress can only do it by a "uniform law on the subject of bankruptcy;" nor, when the law is silent, can the courts do it without the usurpation of legislative power. But the law is not silent; it speaks to the judge; it forbids him to do any act which impairs any lien then existing; and, in deciding the first question submitted in this case, I answer in the affirmative, and repeat the language of the supreme court. "And it would ill become this court under any circumstances to depart from the plain meaning

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of the words used, and to sanction a distinction between the right and the remedy which would render this provision illusive [*330] and nugatory ; mere * words of form, affording no protection, and producing no practical result." 1 How. 318.

But were the bankrupt act open to construction, and the proviso of the 2d section left out of view, the result would be the same. There is no provision in the act that interferes with the laws of a State, which create and defend the obligation of a contract which is a lien on property ; there is nothing which professes to effect the remedies attached to such contract, one incident of which is the power of the creditor to sell or extend as the laws of the respective States have prescribed ; it requires the plenary and unlimited power of congress over the whole subject of bankruptcies to abrogate state laws relating to liens, or to take from state courts the administration of remedies to enforce them, and above all to prohibit the creditor from resorting for his remedy to that law which prescribed it, and substituting the assignee of a bankrupt, the mere creature and servant of a judge of the district court, in his place, without and against the will of the creditor. Congress may delegate such power to a judge or a court, but it must be in plain terms, leaving no doubt of their intention to do so ; but the proposition is a bold one indeed, that judicial power is competent to do it, when the legislature has not given its sanction to its exercise ; it would give the constitution a construction which would authorize the courts to exercise the power granted to the congress, without the passage of a law delegating it to the judicial department. So far as the bankrupt act, by express words, or necessary implication, affects state laws, state rights, the power of state courts, or the rights and remedies of suitors therein, it must be paramount ; yet too much caution cannot be observed on this subject by the courts of the United States.

The settled course of jurisprudence in the State is to be overlooked only when such is the intention of the law ; no intention to do so is to be presumed ; no policy is to be assumed as the basis of the law, other than what its words indicate, and nothing is to be borrowed from any other system which is not consistent with that which congress has thought proper to create. A leading feature of that system is the protection of all liens existing at the time of the decree of bankruptcy ; they are created by contracts which by their own force create a remedy to enforce them ; this remedy is, the right of the creditor ; the rule for its exercise is the law of the State ; the power to sell in this State is the essence of both right and remedy ; that is, that when a statute confers a right, it confers all the necessary means by which such right can be established and made effectual. Con-

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gress has not impaired either, and forbidden it to be done by any construction of the bankrupt act; a sale made pursuant to the laws of the State, must therefore divest the title of the assignee in bankruptcy.

If the foregoing views are sound, they dispose of the two questions; an order of the court in bankruptcy can confer on the assignee no power which congress has not conferred on the court; its powers are what the law has delegated, and none other; the law *may, and must be, construed, where it is open to con- [*331] struction, but where the law itself forbids construction, it must be taken and followed as it reads. If, therefore, an order of court is made that would, in its execution by an assignee, impair a lien protected by the proviso in the 2d section, it is an excess of authority, and therefore void; *à fortiori*, the divesting of a lien in the case put in this question is a much higher act of power than merely impairing it by affecting the remedy. The property bound by the lien is taken from the creditor, his whole right is extinguished, and his debt is lost entirely, unless he comes in for his dividend of the assets of the bankrupt's estate.

Every principle established by the supreme court in the case of *Bronson*, as well as the protection given to liens by the bankrupt act, would be utterly prostrated, if a sale by an assignee would disincumber property mortgaged or bound by a judgment; such a doctrine would equally militate with other plain provisions of the law, which clearly point out what passes by the decree of bankruptcy to the assignee, when it passes, the extent of his, and the power of the court, and the nature of a purchaser's title. The 3d section vests all the property and the rights of property of the bankrupt in the assignee "from the time of the decree of bankruptcy;" he then stands in the position of the bankrupt "before and at the time of his bankruptcy declared." Standing in the place of the bankrupt, the measure of his rights of property is necessarily that of the assignee, who can take nothing which did not belong to the bankrupt when the law made the conveyance of all his rights of property. To the property which was mortgaged, the only right of the assignee was to redeem it; if it was bound by judgment or other lien, the bankrupt held it subject to its payment; he could sell the equity of redemption on the land itself, subject to the lien, but the purchaser could not hold without paying it. The assignee can have no other rights by force of the decree, which is a conveyance by operation of law, than he could acquire by the deed to the bankrupt, nor could the assignee convey a greater interest than the law devolved on him; or the court by their order make his or the estate

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of a purchaser under him, an absolute one discharged of the lien without payment. The 11th section is framed to meet this view of the 3d, by giving power to the court to authorize the assignee to redeem, and omitting any power to order a sale; it is manifestly intended merely to put the assignee in the place of the bankrupt, but in no other respect than enabling the assignee to appropriate the assets in his hands to disincumber the property by payment. Following the proviso in the 2d section, the 11th withholds the power of sale, as that might impair the lien; we thus find that it was deemed necessary to provide for the power of the assignee to redeem. It cannot have been intended that there should be by implication alone the

higher power of sale, that in its exercise would take from [* 332] the *creditor the protection given so carefully by the 2d section; the words of the 11th admit of no such construction; and even if they did, the court could not give it without overlooking the plain language of the 15th section. "And b> it further enacted, that a copy of any decree of bankruptcy, and the appointment of assignee, as directed by the 3d section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignee under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be full and complete evidence, both of the bankruptcy and assignment therein recited, and supersede the necessity of every other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully to all intents and purposes as if made by such bankrupt himself immediately before such order." Here is as precise and perfect a definition of the title which passes to the purchaser by a sale by the assignee under an order of court, or otherwise by virtue of the bankrupt act, with the effect thereof; "it is the same to all intents and purposes as if made by such bankrupt himself immediately before such order," in the words of the 15th section, with or without an order of sale. There is no express provision giving the court power to order a sale. The 3d section authorizes the assignee "to sell, manage, and dispose of the property, to sue for and defend the same, subject to the orders and directions of the court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy, declared as aforesaid." Connecting this with the 15th section, declaring the effect of a sale by an assignee, the answer to the second question is most obvious. Such sale has the same effect as if made by the bankrupt, and no

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other. It can divest no lien existing at the time of the decree or order declaring him a bankrupt. The word "order" in the 15th section refers either to that or to the order of sale; it is not material to which. If to the decree, then the deed of the assignee conveys only such title and estate as the bankrupt then had; if to the order of sale, then that is the time to which his right is referred. But in neither case can a sale divest a lien, "existing before or at the time," or "immediately" before such order. Thus taken, the bankrupt act is an affirmation of the universal principle as laid down by the supreme court in *Rankin v. Scott*, 12 Wheaton, 179, "that a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds," unless it be defective, or the party holding it has done some act to postpone him; and that a purchaser is bound by the lien unless there is a prior act of the legislature to protect him from it. 12 Wheat. 80. The second question, therefore, is answered in the negative.

3 H. 426; 6 H. 486; 13 H. 11; 16 H. 275; 1 B. 508.

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WILLIAM OLIVER and MICAJAH T. WILLIAMS, and others, Appellants, v. ROBERT PIATT.

3 H. 333.

The option of the *cestui que trust* to follow the trust property into the hands of one not a *bonâ fide* purchaser, for value, without notice, or to take its proceeds, cannot be controlled by a repurchase by the trustee, who committed a breach of trust.

Where a creditor of a land company obtained a judgment at law against the company, in a State in which they did not reside, without notice, and levied on land there, in which the company had only an equitable interest, and the trustee of the company, who held the means of obtaining the legal title, gave those means to the creditor, without notice to the *cestuis que trust*. *Held*, that a court of equity would not consider such a title valid.

A decree of sale, in a suit to foreclose a mortgage, in which known *cestuis que trust* are not joined, the only defendant being the trustee who made the mortgage on account of the known *cestuis que trust*, does not bind the title of the latter.

A party, put by the circumstances on inquiry as to a fact, is affected with constructive notice thereof.

An agreement by two land companies to appoint a common agent to buy for their joint and several account at a public sale of the public lands, is not a fraud on the United States.

Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust; and time begins to run against a trust only from the date of its open disavowal.

Even unjustifiable delay and gross inattention on the part of some of the *cestuis que trust*, furnishes no bar to relief against persons conversant with the trust.

No abstract rule as to what is multifariousness can be laid down.

If entire justice cannot so conveniently be done against the same defendants, without uniting different subjects, they may be united in a bill.

Though the court can, *sua sponte*, refuse to proceed at the hearing, because of multifariousness, the defendant can object on account of it, only by plea, or answer, or demurrer.

Heirs are not estopped by a warranty of their ancestor from claiming the property by purchase, but only by descent.

THE case is stated in the opinion of the court.

Stanberry and Ewing, for the appellants.

Pirtle and Scott, contra.

[* 396] * STORY, J., delivered the opinion of the court.

This is the case of an appeal from the decree of the circuit court of the district of Ohio, sitting in equity, rendered in favor of the original plaintiff, and it is brought to this court by the original defendants, who are now the appellants. The record is exceedingly voluminous, and the facts and proceedings complicated and perplexed by a variety of details. A general outline of the leading facts is given in the printed opinion of the court below, with which we have been favored; and those facts cannot be more succinctly stated than they are in that summary; we shall therefore avail ourselves of it upon the present occasion. It is as follows: "In the summer of 1817, the complainant, in connection with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this State, and the complainant was appointed the agent of the company, to attend the sale for that purpose.

"Another association, consisting of Martin Baum, Jesse Hunt, Jacob Burnet, William C. Schenck, William Barr, William [* 397] Oliver, * and Andrew Mack, was formed for the same object, and William Oliver and William C. Schenck were appointed its agents to attend the sale.

"Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and the agents agreed that they would purchase tracts 1, 2, 3, and 4, at, and including the mouth of Swan Creek, in the United States reserve at the foot of the Rapids of the Miami; and also Nos. 86 and 87 on the other side of the river, opposite the mouth of Swan Creek, for the joint benefit of both companies; each company to have one half of the lands purchased, and to pay at the same rate. Nos. 86 and 87 were bid off by Oliver, and the certificates of purchase issued to him. The other tracts were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him.

"At the same sale, the complainant, in behalf of his company purchased the northwest quarter of section 2, township 3, the southwest quarter of the same section, the northwest quarter of section 3,

township 3, and also the southeast and southwest quarters of the same section, in said reserve ; and one fourth of the purchase-money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land.

“ On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Piatt Company, the other the Baum Company ; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with the view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company.

“ On the 14th August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title-bonds, to the purchasers ; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and also the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town, the sale of the lots, &c. By the conditions of sale, one fourth of the purchase-money was to be paid down, and the residue in three equal annual payments.

“ At the sale of lots, the sum of \$855.33 was received by Schenck, for which he was to be accountable to Baum.

“ At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterwards conveyed to Baum, and they erected a warehouse and other improvements on them.

“ In August, 1818, he sold one half of his interest in the [* 398] Port Lawrence Company to William Steele and William Lytle ; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner, Embre.

“ By the reduction of the price of the public lands, and the pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States tracts 1 and 2, having agreed to pay for the same about \$20,000 ; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt companies respectively. In pursuance of this object, the five quarter sections purchased by the Piatt Company were assigned to Baum, the 17th September, 1821 ; and on the same day, tracts numbered 1, 2, 86, and 87, purchased in the name of the Piatt Company for the Port Lawrence Company ; and also tracts 3 and 4, purchased by Oliver

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for the same company, were assigned to Baum. It is alleged that these tracts had been previously assigned to Baum, of which there is no evidence.

“ On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished, to the United States, tracts 1 and 2. On these tracts there had been paid the sum of \$4,817.55. \$1,372.34 of this sum were applied to complete the payments on tracts 3, 4, 86, and 87, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained \$3,445.21. Of this sum, one half belonged to the Piatt Company. \$1,248 were applied to complete the payment on the five quarter sections, which left a balance of \$474.60 still due to the Piatt Company, but which was applied in payment of lands held by the Baum Company.

“ After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and also damages for their improvements.

“ On the 10th September, 1822, Baum gave to Oliver a certificate, which stated there was due him, by the Port Lawrence Company, the sum of \$213.02, which he refunded to purchasers of lots, by the request of the company, ‘it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington.’

“ And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of \$1,835.47; to secure the payment of which, Baum executed to him a mortgage on tracts 3, 4, 86, and 87. The payment was to be made, with interest, on or before the 1st of January, 1824.

“ The 7th October, 1825, Oliver caused an attachment to [* 399] be issued by the clerk of Monroe county, in the Michigan territory, against Baum and the members of the Piatt Company, on the certificate of indebtedment given by Baum. This attachment was levied on four of the five quarter sections owned by the Piatt Company, and such proceedings were had on the attachment, as to obtain an order of sale of the property attached; three of the quarters were sold, by the auditors appointed, for the sum of \$241.60, to Noble, the agent of Oliver. Noble, shortly afterwards, conveyed these tracts to his principal.

“ A bill to foreclose the mortgage given to Oliver was filed by him in the supreme court of Michigan, the 13th of October, 1825. And

a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the chancery court, to Oliver, the 1st September, 1828, for \$618.56.

"By the act of 20th May, 1826,¹ the secretary of the treasury was authorized to select, for the benefit of the university of the Michigan territory, a certain number of acres of the public lands within the territory, and he selected tracts 1 and 2, which had been relinquished.

"In the summer of 1828, as appears from the report of the committee of the trustees of the university, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts 1 and 2, on which the town of Port Lawrence had been laid out.

"A law of congress was passed, authorizing the exchange, the 13th January, 1830.² Previous to this, Baum assigned to Oliver the final certificates for the tracts he purchased under the attachment, and also under the decree of foreclosure; and one of the quarter sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the university tracts numbered 3 and 4, except ten acres reserved of number 3, and the northwest quarter of section 2, township 3, and also the northwest and southwest quarters of section 3, township 3, he received an assignment from the university of their right to tracts 1 and 2, for which patents were issued in the name of Oliver.

"After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one third in tracts 1 and 2, 86 and 87. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number 3. On the 23d May, 1834, he conveyed to him an undivided half of tracts 86 and 87, except sixty acres which had been sold to Prentiss and Tromley; and on the — day of November, he conveyed to him 'one undivided half of lots 1 and 2, on which Port Lawrence * was laid out, together 'with a like interest in all [* 400] sales and improvements thereunto belonging.'

"Oliver, Baum, and Williams, agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts.

¹ 4 Stats. at Large, 180.

² Ib. 370.

“ Some years after this, Oliver purchased from the Michigan university the tracts of land he conveyed to it in exchange for tracts 1 and 2.

“ Of the Piatt Company, John H. Piatt is deceased, and his administrators and heirs are made parties to this suit. William M. Worthington assigned one half his interest in the Port Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant.

“ Of the Baum Company, Martin Baum, Jesse Hunt, William C. Schenck, and William Barr, are deceased.”

Such is a general outline of the leading facts. There are others which may be required to be adverted to in the progress of this opinion; but there are many details which must necessarily be passed over in silence, as they would tend to embarrass the discussion of the main questions in the cause, and obscure rather than illustrate the merits thereof.

The object of the bill is to subject the tracts No. 1 and No. 2, now constituting the site of the town of Toledo, formerly known as Port Lawrence, to the rights of the Port Lawrence Company, composed, as we have seen, of the Piatt Company and the Baum Company, and those who claim under them, now in the possession of Oliver and Williams, under a title derived from the grant of the Michigan university, upon the ground that a trust has attached to those tracts in favor of the Piatt and Port Lawrence companies, under the circumstances which will be presently stated. These circumstances are, that the lands given in exchange to the Michigan university, for tracts No. 1 and No. 2, under the negotiation with the university, were, at the time, the property of the Piatt and Port Lawrence companies, as *cestuis que trust* thereof; that the facts were at the time well known to Baum, and Oliver, and Williams, and consequently that the trust, by operation of law, attached thereto in the hands of those parties. To this conclusion several objections have been taken by the counsel for the appellants. In the first place, that no such trust attached to the lands so given in exchange to the Michigan university, at the time of the transfer, and consequently none to tracts Nos. 1 and 2, taken in the exchange. In the second place, that if it did, as Oliver afterwards repurchased the exchanged lands from the university, and Oliver and Williams under him now hold some parts thereof, the trust is revived, and [*401] has *reattached to these lands, and thus has displaced any supposed trust upon tracts No. 1 and No. 2, at least *pro tanto*. In the next place, that Oliver and Williams are purchasers

without notice of the trust, or of any misapplication of the trust property by the trustee.

Before proceeding to the considerations applicable to the first and third points, it may be well to dispose of that which grows out of the second point, as it involves a most important principle in equity jurisprudence. It is a clearly established principle in that jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bonâ fide* purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and, by a repurchase of the trust fund, to charge the loss or deterioration in value, if any such there had been, in the mean time, to the account of the *cestui que trust*; whereas the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, in such case, to take the new or the original fund is, therefore, (as has been already suggested,) exclusively given to the *cestui que trust*, and is given to him for the wisest purposes and upon the soundest public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. Many cases on this subject will be found collected in the elementary writers. See 2 Sugden on Vendors, c. 14, § 3, p. 148, &c. 9th edit.; 2 Story Eq. Jurisp. §§ 1258–1265, 3d edit.; Com. Dig. Chancery, 4 Wheat. 25–28; and the rule will be found fully discussed and recognized in *Ryall v. Ryall*, 1 Atk. 59; *Lane v. Dighton*, Ambler, 409; *Lench v. Lench*, 10 Ves. 511; and *Docker v. Somes*, 2 Mylne & Keen, 655, in many of its important bearings. Lord Ellenborough, in the case of *Taylor v. Plumer*, 3 M. & Selw. 562, examined and confirmed the doctrine in its application to cases

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at law, and cited and approved the decisions in equity, so [*402] that it is plain upon authority, and the *same would be equally true upon principle, that, if the tracts Nos. 1 and 2 were purchased with the trust fund belonging to the Piatt and Port Lawrence companies, the latter are at full liberty to follow the same into the hands of any persons not being *bonâ fide* purchasers for a valuable consideration without notice; and the circumstance, that there has since been a repurchase of the original trust property by Oliver, does not in any manner affect, or control, or vary the right or option of the *cestuis que trust*. The case is not like that put at the bar, where a part of the funds of the *cestuis que trust* have been mixed up with other funds exclusively belonging to the trustee in the new purchase or investment. In such a case, there may be ground to hold the trust funds in charge *pro tanto* therein. Here, the whole consideration of the purchase was a fund wholly and exclusively belonging to the *cestuis que trust*, if they have made out any title at all, which we shall hereafter consider.

Let us then proceed to the consideration of the other questions above stated. And the first is, whether, at the time of the exchange with the Michigan university, the lands given in exchange for tracts Nos. 1 and 2, were, in the hands of the party or parties making that exchange, affected with any trust such as has been already suggested? And this leads us to the consideration of the antecedent state of facts between the parties to this record.

We have seen that the original purchase of tracts Nos. 1, 2, 3, and 4, and Nos. 86 and 87, was made for the account and benefit of the Port Lawrence Company; and the object of the purchase was to lay out a town thereon, and to sell the lots to purchasers. Baum was appointed a trustee and agent for this purpose, and he was to make sale of the lots and conduct the other affairs of the agency. With the consent of the company, in August, 1817, he employed Oliver as a subagent, who received instructions from the company in relation to the plan of the town (which he was to lay out in conjunction with Wm. C. Schenck) and the sale of the lots. This agency of Oliver, under Baum, was originally (as it should seem) limited to one year, but it was certainly continued, if not for all, at least for some purposes, to a much later period. In August, 1818, Oliver sold one half of his interest in the Port Lawrence Company to Steele and Lytle, and in March, 1819, he sold the residue to the defendant, Williams, and his partner, Embre. And these facts are most important to be borne in mind, since they clearly establish that Oliver, as an original proprietor, and Williams, as a derivative proprietor, under Oliver, in the Port Lawrence Company, had full and complete notice of the

nature and objects of the original purchase by that company, and of the trust and agency of Baum in accomplishing those objects. In truth the laying out of a town on those tracts, and the sale of the lots, seems to have been an enterprise always cherished by some of the company with uncommon solicitude and sanguine expectations of profit.

* In consequence of the reduction of the price of the public [* 403] lands by congress,¹ and the pressure of the times, the Port Lawrence Company found themselves compelled, in 1821, to relinquish a part of their tracts to the government. For this purpose they assigned all the four tracts to Baum, in September, 1821; and the Piatt Company, at the same time, assigned to Baum their five quarter sections; and he, through the defendant, Williams, thereupon relinquished tracts Nos. 1 and 2 to the United States, and the return purchase-money was applied *pro tanto* to complete the payments due on the other tracts, (Nos. 3 and 4, and Nos. 86 and 87,) and the residue was applied partly to pay the balance due on the five quarter sections, purchased by the Piatt Company, and partly to pay a balance due on other lands purchased by the Baum Company.

Pausing here, for a moment, it is apparent that the original trust created in tracts Nos. 1 and 2, under the agency and assignment to Baum, for the benefit of the Port Lawrence Company, was, by this relinquishment to the government, entirely displaced and extinguished. These tracts afterwards, in the summer of 1828, under the act of 20th of May, 1826, were selected by the secretary of the treasury for the Michigan university, and certainly came into the possession of the latter discharged of the trust. Still, however, it is obvious from the papers in the cause, that in the intermediate time between the relinquishment of these tracts and the grant thereof to the university, the original plan of establishing a town on the site remained a favorite project of Baum as agent of the Port Lawrence Company, and he made strenuous efforts, by applications to congress and to the general land-office, to reacquire the title thereof, not for himself alone, but, as his applications and letters show, on behalf of himself and his associates. He constantly held himself out as acting for the benefit of the concern; and there is every reason to suppose that some, if not all of his associates were lulled into security, and contemplated, if he should be successful, to resume the original plan. This may serve in some measure to explain their inactivity, and to show that they continued to place unlimited confidence in Baum, that all his proceedings would be for their benefit, and not for his own sole advantage. Baum petitioned congress on the subject as early as January, 1822, and in his letter to Mr. Brown, (a senator in congress,) of

¹ 3 Stats. at Large, 566.

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the 25th of December, 1822, inclosing a duplicate of his petition, he says: "Inclosed is the petition signed by myself only; still, others have an interest in it;" and he names in the letter and its postscript, Williams, Piatt, and others. In another letter to the same senator, dated the 6th of February, 1823, he says: "The tracts purchased by myself and associates in that quarter; those retained and relinquished can be ascertained in the land-office." In another letter, addressed to the commissioner of the general land-office, as late as the 27th of

July, 1827, he says: "In consequence of the President's [* 404] proclamation, announcing *the sales of lands, I attended, at

Delaware, on the 9th instant, but was much disappointed to find there instructions of the general land-office, to withhold from sale all lands situate north of the line which divided the State of Ohio and the Michigan territory, for I went there for the express purpose of repurchasing tracts Nos. 1 and 2, in the Maumee reservation, which I formerly owned and which I have relinquished." He adds: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent, for the purpose of managing and conveying them, in case of sales." In the same letter, he protests against the trustees of the Michigan university having a grant of these tracts, as they have no claim to the same, and that he has a strong claim upon the government.

To repel the inferences deducible from these facts, it is said that the testimony of Carneal establishes that Piatt attended that very sale at Delaware, for the purpose of buying these tracts, not for the Port Lawrence Company, but for another company, consisting of Colston, Carneal, and himself; and that Baum also attended on his own account, and not for the Port Lawrence Company. Of transactions of this nature, after such a lapse of time, it is perhaps not easy to ascertain all the facts which then regulated the conduct of the parties, when they depend upon the frail recollections of witnesses. It is quite possible that the circumstances might have been explained, and nothing have been intended by either party really injurious to the interests of the Port Lawrence Company. But as no sale took place of these tracts upon that occasion, the only effect which can be properly attributed to the testimony, admitting it in its fullest latitude, is, that it weakens our confidence in Piatt's own conduct, and diminishes the force of the inference as to Baum's then acting as an agent for the Port Lawrence Company. But the written statements of Baum, in the letters above cited, are evidence of his intentions and acts, of a far higher character, which the lapse of time has not obscured or varied; and those letters are, as to himself, most conclusive to show that he did not deem himself as acting for

his own interest alone, but for that of his associates also, in his whole proceedings to reacquire those tracts.

As soon as the Michigan university had obtained a title to tracts Nos. 1 and 2, (in the summer of 1828,) Oliver, avowedly on behalf of Baum, made an application to the trustees of that university, for an exchange of those tracts for other tracts in the vicinity. These negotiations were begun as early as the 12th of August, 1828, and various propositions were made, and negotiations were had by the trustees and Oliver, as agent of Baum, between that time and the 4th of January, 1831, when the consent of congress having been obtained for the exchange, by an act approved on the 13th of January, 1830, the university agreed to make the exchange; and accordingly, by their deed, dated the 7th day of February, 1830, did

*convey their right and title to tracts Nos. 1 and 2, to [*405] Oliver in fee-simple, in consideration of receiving a deed from Oliver of certain tracts, containing seven hundred and sixty-seven and a half acres, namely: the whole of tracts Nos. 3 and 4, the southwest quarter of section 2, and the west half of section 3; the tracts being part of the purchase of the Port Lawrence Company, and the quarter and half sections being part of the purchase of the Piatt Company, in 1817. We thus trace the trust property home to the Michigan university, as obtained by a conveyance from and under Baum and Oliver, in pursuance of a negotiation, avowedly made by Oliver on behalf and as agent of Baum, as the sole consideration of the grant of Nos. 1 and 2 to Oliver by the university.

And this conducts us to the consideration of that which is the main hinge on which the present case turns; that is, whether the tracts so conveyed by Oliver to the university, were at the time affected with the trust in favor of the Piatt and Port Lawrence companies, with which they were originally chargeable in the hands of Baum. This necessarily involves a review of the title of Oliver to the tracts (the three quarter sections) belonging to the Piatt Company under the attachment proceedings in Michigan, and also of his title under the mortgage of tracts Nos. 3 and 4, and Nos. 86 and 87, belonging to the Port Lawrence Company, and the foreclosure thereof, in connection with the subsequent acts of Baum and Oliver in the premises. Unless the title thus derived is beyond all legal exception, (*omni exceptione major*,) as an adverse and unimpeachable title, it is plain that the original trust attached at the time of the exchange to the tracts so conveyed, and consequently (as has been already suggested) it was, at the option of the *cestuis que trust*, transferable and transferred to tracts Nos. 1 and 2. For, it is in our judgment beyond all question that Oliver, at the time of the exchange,

had full notice of the trust and title originally invested in Baum, and that his acts, in making the exchange, are to be deemed the acts of Baum, and affected by the same considerations as if personally transacted by Baum himself, and were designed by mutual consent to promote the contemplated objects and interests of both.

And, first, let us review the proceedings under the attachment. In September, 1822, Baum gave a certificate to Oliver, stating that a debt of \$213.2 was due to him from the Port Lawrence Company, for money refunded to purchasers of lots at the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and Wm. M. Worthington." These persons constituted the Piatt Company; and, consequently, the claim thus asserted was a subdivision of a debt confessedly due from the Port Lawrence Company, in which the Piatt Company had a moiety of the interest only. Whether Baum had, in virtue of his general agency, the right to give such a certificate, thus severing a joint debt, so as to be binding upon the [* 406] Piatt Company * alone, without their consent, and whether this certificate was *bonâ fide* given under justifiable circumstances, it is unnecessary to consider, although the transaction is certainly open to some observation, in point of authority as well as propriety in the then unliquidated concerns of the Port Lawrence Company. Assuming, however, the transaction to have been perfectly correct and binding in all respects, let us examine the subsequent proceedings consequent thereon. Upon this certificate, Oliver, in October, 1823, instituted a suit by attachment in Monroe county, in the territory of Michigan, against Baum, Robert Piatt, G. A. Worth, and William Worthington, (John H. Piatt being then deceased,) alleging them to be joint partners and survivors, and all residing out of the territory, upon which four of the quarter sections of land owned by the Piatt Company, in that county, were attached. At the October term, 1826, of the same court, judgment was obtained by default against all the defendants, no appearance having been entered for them; and, upon the execution issuing thereon, three of the four sections (those which were afterwards conveyed to the Michigan university) were sold, and bid off by an agent of Oliver, and were afterwards conveyed by him to Oliver. Of this suit, there is no pretence to say, that any of the defendants, except Baum, had any notice, if indeed he had any, although some of them resided in the same State where Oliver resided, and one of them in a neighboring State, at no great distance, who was known to be a man of large property. The other members of the Port Lawrence Company were not made parties to the suit. It was brought in a distant terri-

tory, almost then a wilderness, more than two hundred miles from the residence of the defendants; and if it had been the design of Oliver to procure a judgment against the parties, without any notice to them, which should be obligatory upon them, and to give Oliver a good title to the lands at a comparatively trivial price, better means could scarcely have been devised to accomplish the purpose. For the institution and consummation of this suit behind the backs and without the knowledge of the parties in interest, no better excuse can now be found than that Oliver did not choose to institute a suit against them at home, as it might give them offence, and break up some former ties of acquaintance. How far such an excuse is admissible, we do not stop to inquire. It rather tends to cast a shade upon the transaction, than to vindicate it. But what was the title thus acquired, supposing all the proceedings to be *bonâ fide*? It was a mere naked title in equity to the tracts, the title to which still remained in the United States; and the legal title could not be consummated, unless the certificates of the purchase, and payments for the tracts, were first surrendered to the United States. Those certificates were then in the hands of Baum, as trustee of the Piatt Company; and he had no right, under the circumstances, to assign or surrender those certificates to Oliver, to enable him to make his title available at law, without the express consent * of [* 407] the Piatt Company. If he had refused, Oliver could not have obtained them, unless upon a bill in equity, to which all the proprietors should be made parties, and in which they would have been at full liberty to examine into the validity and merits of the original claim of Oliver, on which his attachment was founded, and also into the regularity and *bona fides* of the transactions in and under the suit. Yet Baum, in December, 1828, assigned and surrendered up these certificates to Oliver, and thus enabled him to consummate his title and reduce it to a legal title, by obtaining a patent, without any such consent; and in so doing, he was guilty of a manifest breach of trust, of which Oliver cannot now be permitted to pretend ignorance. It is also a fact of no small significance, that the surrender of these certificates was contemporaneous with the surrender to Oliver of the certificates of tracts Nos. 3 and 4; and subsequently, in December, 1829, a like surrender of Nos. 86 and 87, belonging to the Port Lawrence Company, under the foreclosure of the mortgage, which we shall have occasion to review; and that all this was done pending the negotiations with the Michigan university by Oliver, on behalf of Baum for the exchange.

This view of the matter releases us from no small doubt and difficulty in relation to an argument pressed at the bar with great earnest-

ness; and that is, whether such an equity was attachable and vendible under the attachment law of Michigan. There is great difficulty in maintaining the affirmative, for the reasons stated in the opinion of the learned judge in the court below; and especially if, as has been suggested, the act is but a transcript of an act of New Jersey, and the courts of that State have, as has been asserted at the bar, held no such equity attachable.

Then, as to the mortgage and the proceedings under it. The mortgage was given upon tracts Nos. 3 and 4, and Nos. 86 and 87, by Baum to Oliver, in August, 1823, upon an account then adjusted between him and Oliver against the Port Lawrence Company (and which does not appear ever to have been examined or sanctioned by the company itself) for a balance of \$1,835.47, then supposed to be due to him for money paid and services rendered by him as agent of the company. In October, 1825, a bill was filed in the supreme court of Michigan (within which these tracts were situate) to foreclose the mortgage; and such proceedings were had upon this suit that, in September, 1828, the tracts were sold, and at the sale bought by Oliver for the sum of \$618.56, and a deed of conveyance thereof was accordingly made to him. To this suit Baum alone was made a party; none of the other proprietors of the Port Lawrence Company being made parties, although Oliver knew perfectly well who they were, and that Baum was merely their trustee, and that they were the *cestuis que trust*, possessing the beneficial interest in the premises. Under such circumstances, to allow the foreclosure to stand, so as to conclude the rights of the *cestuis que trust*, would be a [* 408] violation of *all the doctrines of courts of equity upon this subject. The decree must be treated, as to them, as wholly inoperative and void.

But there is another view of the matter, which is conclusive. The mortgage was of a mere equity, the legal title being still outstanding in the United States; and supposing that this equity could have been foreclosed in such a suit, (which, considering the defect of the real parties in interest, it clearly could not,) still, it was a naked equity, which could be made available to obtain a legal title from the United States, only by an assignment and surrender of the certificates of the purchase and payments, then held by Baum for the benefit and use of the Port Lawrence Company. And here, again, the same considerations apply, which have been already suggested. Oliver could not obtain an assignment and surrender of those certificates, except by a bill in equity against Baum, to which the other proprietors in the Port Lawrence Company must have been made parties, as they were necessary parties; and thus the whole merit of the mortgage and

foreclosure must have been brought directly before the court for adjudication. Yet Baum, without any consultation with or assent of those proprietors, assigned and surrendered the certificates of those tracts also to Oliver, and thus enabled him to obtain a patent therefor from the United States, in subversion of their rights and his duty. This was a gross breach of trust, and was done (let it be repeated) in December, 1828, and 1829, pending the negotiations with the Michigan university, obviously for the purpose of enabling Oliver in his, Baum's, name, and on his behalf, to consummate the exchange. And, finally, when the negotiation was consummated by means of these very certificates, Oliver, with the consent of Baum, was enabled to obtain a patent therefor, on the 4th of March, 1831.

Very soon after the patent was so obtained, namely, on the 16th of May, 1831, we find that Baum, Oliver, and Williams entered into a written agreement, by which Oliver purported to sell, in fee-simple, to Baum and Williams, each one third part of the tracts Nos. 1 and 2, and Nos. 86 and 87, with the exception of sixty acres out of No. 86; and they were to receive a quitclaim deed therefor from him accordingly, for the sum of \$1,555 for each third part. The parties further agreed to lay out a town upon the old site, with some change of the plan, and to bring the lots into the market for sale; and they were to contribute to the charges and expenses according to their respective interests. After the death of Baum, Oliver purchased his share of the tracts from his heirs; and by certain deeds of quitclaim, executed in December, 1832, in May, 1834, and in November, 1834, Oliver conveyed one half of the premises to Williams.

Now, looking at these transactions together, it seems almost impossible to escape from the conclusion, that Baum and Oliver had a mutual interest in the negotiation with the Michigan university; that it was not only carried on in the name of Baum, and apparently for his account, but that Oliver acted as his agent throughout; that the * deed from the university was made directly to [* 409] Oliver, with the consent of Baum; that the assignment and surrender of all the certificates by Baum, to Oliver, was for the express purpose of enabling Oliver to complete the bargain with the university; and that the agreement between Baum, Oliver, and Williams, which followed almost immediately upon the grant of the patent, was made in pursuance of a prior understanding between all the parties, and was but a consummation of the objects originally contemplated by Baum and Oliver, from the period of their first negotiation with the university down to the time of the execution of that agreement. And all this was done by Baum and Oliver, without the knowledge, or consent, or approbation, of the Piatt and Port Law-

rence companies, and was never sanctioned by them. Under such circumstances, what is the true duty of a court of equity? It is to hold the parties engaged in these transactions, with full notice of the title and the trust in Baum, bound by that trust, and to enforce that trust against the tracts Nos. 1 and 2, so far as they remain in their hands unaffected by the rights of purchasers under them, *bonâ fide* for a valuable consideration, without notice. In our judgment, no reasoning can make the proposition more clear than a simple recital of the facts, and the statement of the general doctrine of equity jurisprudence that the *cestuis que trust* have an option to follow their property, or its proceeds, into any other property into which it has been converted by a breach of the trust, subject only to the rights of such purchasers as have been just referred to. Indeed, the question, as against Baum and Oliver, seems absolutely closed by the state of the evidence; and their intimate knowledge of the whole concern requires neither illustration nor commentary.

Let us, then, proceed to the consideration of the case as to Williams. It is said that he stands in the predicament of a *bonâ fide* purchaser for a valuable consideration, without notice; and if he does, he is certainly entitled to protection. Williams, in his answer, asserts himself to be such a purchaser, but it is difficult to maintain that averment in its just legal sense, looking to all the circumstances of the case. In 1819, he became a purchaser of one half of the interest of Oliver in the Port Lawrence Company, and, as such, he could not fail to know that tracts Nos. 1 and 2, 3 and 4, and Nos. 86 and 87, belonged to that company; and he has never ceased to be a member of that company. In 1821, he was employed by Baum, the acknowledged trustee and agent of the company, to surrender tracts Nos. 1 and 2 to the government of the United States; and through him the relinquishment took place. He says that he did not know of the negotiation between Oliver and the university, for an exchange of the lands, until after its consummation, and never heard of the details of said negotiations, nor what lands were given in exchange, except parts of tracts Nos. 3 and 4. Now, these very tracts belonged to the Port Lawrence Company, so that he was necessarily [* 410] * put upon the inquiry by what means Baum had parted with them, and Oliver had become possessed of them. Besides, in his negotiation and surrender of tracts Nos. 1 and 2 to the government, and the apportionment of the funds arising from the relinquished lands, first to the remaining lands of the Port Lawrence Company, and then to the lands respectively purchased by the Piatt and Baum companies, he necessarily became acquainted with the relative interests of all these companies therein. The origin and title

of the Michigan university to the tracts Nos. 1 and 2, and the exchange thereof with Oliver, were matters of public notoriety, and proclaimed in the acts of congress under which the exchange was made. The deed from the university to Oliver recited the material facts respecting the lands given in exchange, and referred to the records of the antecedent negotiations; and the patent itself, from the government, of tracts Nos. 1 and 2, referred to the deed of Oliver to the university, of the lands given in exchange; so that it is most manifest that Williams, as a proprietor in the Port Lawrence Company, and as agent thereof in the relinquishment above referred to, and as a purchaser under Oliver, not only had the most ample means of knowing the nature and character and extent of the title of Oliver to the lands under consideration, but he was positively put upon inquiry in relation to the whole matter. If, under such circumstances, he chose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to avail him against the rights of the *cestuis que trust*. If we add to this the fact that within two months after the patent was obtained by Oliver, he and Baum united in an agreement with Oliver, by which each was to take a third part in the tracts Nos. 1 and 2, and Nos. 86 and 87, (these tracts never having been relinquished by the Port Lawrence Company to the government,) to be laid out as a town, and the lots sold on joint account, it would seem almost incredible that he should not have made some inquiries on the subject. And the only reasonable conclusion seems to be, that he was in as full possession of all the facts as were his partners, Oliver and Baum. Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bonâ fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.

And here, in our judgment, the merits of the case would seem to be brought to a close. But certain objections have been made to * the right of the plaintiff to maintain the bill upon [* 411] other collateral grounds. In the court below an objection was taken, by way of plea, that the original agreement of the Piatt and Baum companies, in regard to the purchases of these tracts at

the public sale in 1817, was an illegal combination in fraud of the rights of the United States, and therefore it makes the whole purchase an utter nullity. This objection was fully answered in the opinion of the circuit court, in which, on this point, we fully concur. It has been abandoned by the learned counsel here; and, indeed, in our opinion, properly abandoned, as unmaintainable in point of fact as well as law.

Another objection is to the lapse of time. The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Now, until 1831, no final overt act was done by Baum in violation of his duty as trustee; and the first and great breach of that duty, on his part, was the surrender of the certificates of the tracts to Oliver at different periods between 1828 and 1831. At what particular period the subsequent acts of Baum, Oliver, and Williams became first known to the plaintiff and the other proprietors of the Piatt and Port Lawrence companies having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most probably not exceeding eight or ten. That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly conversant of the trust, it can furnish no ground for any denial of the relief which the case otherwise requires.

Another objection urged at the argument is, that the bill is multifarious in uniting the trust property owned by the Piatt Company and the Port Lawrence Company in one bill, as the interests of each are separate and distinct in the tracts conveyed by Oliver to the Michigan university. We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint. It was well observed by Lord Cottenham, in *Campbell v. Mackay*, 1 Mylne & Craig, 603, and the same doctrine was affirmed in this court, in *Gaines and* [* 412] *Wife v. Relf and Chew*, 2 How. 619, 642, that it is *im-

practicable to lay down any rule, as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court.¹ But, if the objection were tenable, (as we are of opinion it is not,) it would be quite too late to insist upon it. The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea, or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. *A fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity. There is no pretence to say that such is the predicament of the present cause in this court.

Another objection taken at the argument is, that Baum's heirs cannot insist upon any title to the property in question, because they are bound by the warranty of their ancestor in the conveyance thereof to Oliver. But this objection has no foundation whatsoever in law, whether the warranty be lineal or collateral; for the heirs here do not claim any title to the property by descent, but simply by purchase; and it is only to cases of descent that the doctrine of warranty applies. For this it is sufficient to cite Litt. § 735; Co. Litt. 365; Com. Dig. Guarantee, I, 2, and Bac. Abridgment, Warranty, G, H, I, L. The fact, therefore, that assets descended upon Mary P. Ewing, one of the children and heirs of Baum, can have no influence upon the right of her husband or herself to enter the land in controversy by purchase, however it might repel their right to take it by descent.

Another objection suggested at the argument was the difficulty of apportioning the respective interests of the *cestuis que trust* in the tracts Nos. 1 and 2. But this difficulty has been overcome; and it constitutes no matter of difference between the Piatt and the Port Lawrence companies, so far as their own interests are concerned, as distinguished from that of Oliver and Williams.

¹ See, also, Story's Eq. Plead. §§ 530-540, and the authorities there cited. Attorney-General v Cradock, 3 Mylne & Craig, 85.

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As to the report of the master and the exceptions thereto in the court below, although those exceptions were not formally overruled or allowed; yet it is plain that in the final decree they were all disposed of, some being allowed and others disallowed; and [* 413] no argument * has been addressed to us upon the present occasion, which points out any specific errors, which require correction beyond those which have been already incidentally hinted at.

We pass over some other objections, which were suggested at the argument, without remark, as this opinion has already been protracted to an unusual length. We need only say, that we see nothing in those objections which requires us to reform the decree of the court below.

Upon the whole, the decree of the circuit court is affirmed, with costs.

4 H. 508; 9 H. 421; 6 Wal. 299.

WASHINGTON BRIDGE COMPANY, Appellant, v. WILLIAM STEWART,
JAMES STEWART, and JOHN GLENN.

3 H. 413.

Though this court has jurisdiction of appeals only from final decrees of the circuit courts, yet if this court actually entertains jurisdiction and affirms the decree of a circuit court, and remands the case for further proceedings, the question whether the decree appealed from was final, cannot be raised by a second appeal from the decree of the circuit court subsequent to those further proceedings; such an appeal brings under review only the proceedings of the circuit court subsequent to the mandate.

This court has no power to review its decisions; and after the expiration of the term at which a decree is entered, it becomes finally binding and conclusive, though the decree of affirmance was by a divided court.

THE case is stated in the opinion of the court.

Bradley, for the appellant.

Coxe, contra.

[* 424] * WAYNE, J., delivered the opinion of the court.

This cause is now before us upon an appeal from a decree of the circuit court, made by it upon an auditor's report, in conformity with the mandate issued by this court, when the cause was before it upon a former occasion.

The appellants did not except to the auditor's report, in the court below. When the cause was tried upon the first appeal, the decree of the circuit court was affirmed by a divided court.

We are now asked by the counsel for the appellants to permit him to reëxamine the decree of the circuit court, upon its merits, affirmed as it was by the supreme court, upon the ground that the affirmance was made when this court had not jurisdiction of the case; the first appeal having been taken upon what has since been discovered to have been an interlocutory and not a final decree.

The supreme court certainly has only appellate jurisdiction, where the judgment or decree of the inferior court is final. But it does not follow, when it renders a decree, upon an interlocutory and not a final decree, that it can, or ought, on an appeal from a decree in the same cause, which is final, examine into its jurisdiction upon the former occasion. The cause is not brought here in such a case for any such purpose. It was an exception, of which advantage might have been taken by motion on the first appeal. The appeal would then have been dismissed for the want of jurisdiction, and the cause would have been sent back to the circuit court for further proceedings. But the exception not having been then made of the alleged want of jurisdiction, the cause was argued upon its merits, and the decree appealed from was affirmed by this court. Its having been affirmed by a divided court, can make no difference as to the conclusiveness of the affirmance upon the rights of the parties. It is settled, that when this court is equally divided upon a writ of error or appeal, the judgment of the court below stands affirmed. *Etting v. Bank of the United States*, 11 Wheat. 59; the case of *The Antelope*, 10 Wheat. 66. Having passed upon the merits of the decree, this court has now nothing before it but the proceedings subsequent to its mandate. So this court said in *Himely and Rose*, and in the case of *The Santa Maria*, 5 Cranch, 314; 10 Wheat. 431. Its decree became a matter of record in the highest court in which the cause could be finally tried. To permit afterwards, upon an appeal from proceedings upon its mandate, a suggestion of the want of jurisdiction in this court, upon the first appeal, as a sufficient cause for re-examining the judgment then given, would certainly be a novelty in the practice of a court of equity. The want of jurisdiction is a matter of abatement, and that is not capable of being shown for error to indorse a decree upon a bill of review. Shall the appellant be allowed to do more now, than would be permitted on a bill of review, if this court had the power to grant him such a remedy? If he was, we should then have a mode for the review of the decrees * of this court, which have become matters of rec- [*425] ord, which could not be allowed as an assignment of error for a bill of review, in any of those courts of the United States in which that proceeding is the ordinary and appropriate remedy.

The application has been treated in this way, to show how much at variance it is with the established practice of courts of equity.

It might, however, have been dismissed, upon the authority of a case in this court, directly in point, *Skillern's Executors v. May's Executors*, 6 Cranch, 267, and upon the footing that there is no mode pointed out by law, in which an erroneous judgment by this court can be reviewed in this or any other court. In *Skillern's* case, the question certified by the court below to this court, for its decision, was, whether the cause could be dismissed from the circuit court, for want of jurisdiction, after the cause had been removed to the supreme court, and this court had acted upon and remanded the cause to the circuit court, for further proceedings. This court said: "It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court is not alleged in the pleadings." The jurisdiction of this court, in that case, was as defective as it is said to have been in this. When that cause was before this court, though the judgment of the court below on it would have been reversed, upon motion, for the want of jurisdiction on the face of the record, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment no doubt was, that the motion to dismiss the case, in the court below, for the want of jurisdiction, after it had been before the supreme court by writ of error, and had been acted upon, would have been equivalent, had it been allowed, to a decision that the judgment of this court might be reviewed, when the law points out no mode in which that can be done, either by this or any other court. The want of power in this court, to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question. Such is the result of what the court said in *Himely and Rose*, 5 Cranch, 314. The court says, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, in reply to the allegation that its judgment had been rendered when it had not jurisdiction: "To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained on principle. A final judgment of this court is supposed to be conclusive upon the rights it decides, and no statute has provided any process by which this court

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can reverse its *judgments. In several cases formerly ad- [* 426] judged in this court, the same point was argued, and expressly overruled. It was solemnly held, that a final judgment of this court was conclusive upon the parties, and could not be re-examined." In *Browder v. McArthur*, 7 Wheat. 58, counsel applied for a rehearing; the court refused it, saying a subsequent appeal brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. The same is said with equal positiveness in the case of *The Santa Maria*, 10 Wheat. 442. To these cases we add an extract from the opinion of the court, given by the late Mr. Justice Baldwin, in *Ex parte Sibbald*, 12 Pet. 492. That case called for the most careful consideration of the court. "Before we proceed to consider the matter presented by these petitions, we think it proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case, brought within its appellate jurisdiction, as well as that which the court, whose final decree or judgment has been thus verified, ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The supreme court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. 1 Wheat. 355; 6 Wheat. 113, 116. Both are conclusive of the rights of the parties thereby adjudicated."

These cases are decisive of the motion made in this case; and as the decree now appealed from carries into execution the mandate issued by this court upon the first appeal, we direct it to be affirmed.

6 H. 31; 18 H. 42; 20 H. 535.

RICHARD NUGENT, Assignee of ELIZABETH NORTON in Bankruptcy,
Plaintiff in Error, v. GEORGE W. BOYD, ISAAC T. PRESTON, and
ABNER PHELPS, Defendants.

3 H. 426.

Under the bankrupt law of August 12, 1841, (5 Stats. at Large, 440,) a circuit court of the United States rightly dismissed a bill, the object of which was to deprive a creditor of the benefit of a judgment recovered in a state court prior to the bankruptcy, and which operated as a mortgage on the lands of the bankrupt, no fraud or other cause of invalidity being alleged.

THE case is stated in the opinion of the court.

Nugent, for the appellants.

Wilde and Henderson, contra.

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[*434] *TANEY, C. J., delivered the opinion of the court.

It appears in this case, that, in January, 1844, a bill was filed in the circuit court of the United States for the eastern district of Louisiana, sitting in chancery, by Richard Nugent, assignee of the estate of Elizabeth Norton in bankruptcy, stating, that the said Elizabeth Norton, on the 9th day of May, 1842, filed her petition in the district court of the United States to be declared a bankrupt, and

that she was accordingly decreed to be such about the 1st [*435] of June, in *the same year; that she returned in her schedule

two lots of ground in the city of La Fayette, particularly described in the bill; and that George William Boyd was, among others, returned as a creditor for the sum of \$9,000, and that notice was served on him of the proceedings in bankruptcy. The bill further states, that prior to and at the time of the petition in bankruptcy, the two lots above mentioned were affected by a special mortgage to the said Boyd, which was valid by the laws of Louisiana, for the sum of \$9,000 and upwards; that prior to the bankruptcy of Elizabeth Norton, that is to say, about the 11th of November, 1841, Boyd commenced suit upon his said mortgage in the proper state court of Louisiana, and obtained judgment, with the privileges of a mortgage, and issued execution thereon, which was levied upon the said property about the 16th of February, 1842; and on or about the 4th of June following the property was regularly sold by the sheriff under the execution to Isaac T. Preston and Abner Phelps, who took possession of the said two lots, and continue to hold them, claiming as owners. The bill further states that the complainant, having received notice of the levy and intended sale under the execution, duly notified the said Boyd, Preston, Phelps, and the sheriff, in writing, before the sale, of his appointment as assignee as aforesaid, and cautioned them not to proceed with the sale; but that the parties, contriving and intending to defeat the just rights of the complainant, proceeded to sell, and placed the purchasers above mentioned in possession of the property in question. The complainant refers to and exhibits with his bill certain rules adopted by the district court of the United States for the disposition of real estate surrendered by bankrupts, and incumbered by mortgages; and charges that, by virtue of the bankrupt act, all the proceedings in the state court ought to have been stayed, from the moment the petition of the bankrupt was filed; and that the subsequent proceedings were irregular, and conferred no title on the purchasers; and that the complainant was entitled to take property from the hands of the sheriff, and to administer and sell the same under the direction of the district court by virtue of the act of congress and the rules of court above mentioned. The

bill then prays process against Boyd, Preston, and Phelps, and that the proceedings under the execution subsequent to the petition in bankruptcy should be declared irregular; that the title of Preston and Phelps from the sheriff should be decreed to be null and invalid, and the said Preston and Phelps be ordered to restore the said lots to the possession of the complainant, to be administered and sold by him in conformity with the orders of the district court of the United States, and in pursuance of the rules before referred to; and that Boyd should be directed to come into the district court, and conform himself to the orders of the court and the rules aforesaid.

The defendants appeared, and demurred to the bill, and
*upon final hearing on the demurrer, the following decree [* 436]
was passed by the circuit court:—

“This is a bill in equity, presented by an assignee in bankruptcy, to set aside a certain sale, made under a writ of seizure and sale from the district court of Louisiana, upon the ground that the district court of the United States was, by the bankrupt law passed by congress on the 19th of August, 1841, vested with exclusive jurisdiction over all matters appertaining to the settlement of the affairs of the bankrupt; and that, consequently, the sale made by the district court of Louisiana has transferred no legal title to the property. The bill further claims the property sold as a part of the property of the bankrupt to be sold or otherwise disposed of under the orders of the district court of the United States. It appears that the property in question consists of real estate, and that the same was sold to satisfy a special mortgage held by the creditor who obtained the order of seizure and sale from the state tribunal.

“I have, after an attentive consideration of the various allegations in the bill, ordered the same to be dismissed, and shall now proceed to state very briefly the grounds upon which I acted. In the first place, I do not consider that there is any equity in the bill; the property was specially mortgaged to satisfy the claim of the creditor who demanded the sale; and it does not appear that in the assertion of his right he has in any manner interfered with the rights of the other creditors of the bankrupt. It does not appear that any doubt existed as to the validity of the mortgage, or that the creditor has obtained any right or any advantage over the other creditors which the district court, sitting in bankruptcy, would not have been bound to award him under the express provisions of the bankrupt law. It is quite clear that the liens and mortgages which are valid under the state law must be protected by the district court of the United States, sitting in bankruptcy, and it will not be pretended that the creditor, at whose instance the property in question was sold, would

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not have been entitled, under any and all circumstances, to the proceeds of that property to satisfy the amount alleged to be due him. What benefit would then accrue to the general creditors of the bankrupt by the interference of this court in a matter which seems to have been fairly and finally adjudicated? While I am well satisfied that no good would arise from such an interference, I am equally well satisfied that great injustice would be done both to the mortgage creditor and to the estate of the bankrupt, by subjecting both unnecessarily to additional costs and expenses.

"I agree fully in the opinion, that upon the ground of expediency the jurisdiction of the district court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive; but I do not understand the bankrupt law to render it so. Where a creditor, by virtue of a special mortgage, elects to foreclose that mortgage before a state tribunal, the federal court is [*437] not called upon to interpose, except in cases where from the nature of the case wrong or injustice may be done to other creditors in interest, or where the mortgage itself may be contested.

"I wish it, however, to be distinctly understood, that I am fully of opinion that the district court of the United States is vested with jurisdiction over mortgaged property belonging to the bankrupt, and that when a proper case is shown, it has power to foreclose a mortgage, and to do all other acts necessary to bring about a final distribution and settlement of the bankrupt estate. I am also of the opinion that, in a case where a creditor calls in question the validity of a mortgage held by another creditor, it is the duty of the said court to exercise jurisdiction over the questions involved, and, if necessary, to declare the mortgage null and void.

"In the case before me, no such question is involved, and I see no reasons why the equity powers of this court should be exercised to do that which cannot change the rights of the parties interested, but which would have the effect of doing a positive injustice to the mortgage creditor, by subjecting his property to useless costs and expenses.

"It is, therefore, ordered that the complainant's bill be dismissed."

We have inserted the whole of this decree, because we think the court were not only right in dismissing the bill, but, with a single exception, we concur also in the principles and reasoning on which the learned judge founded his decision. The exception to which we allude is that part of the decree in which he expresses his opinion, that upon the ground of expediency the jurisdiction of the district court of the United States over all the property of the bankrupt,

mortgaged or otherwise, should be exclusive, so as to take away from the state courts any jurisdiction in such cases. Upon that subject it is not our province to decide, and we have no desire to express an opinion upon it. But in every other respect the decree conforms to the opinion delivered by this court, at the present term, upon the motion for a prohibition in the case *Ex parte* the City Bank of New Orleans, in the Matter of Wm. Christy, assignee of Daniel T. Walden, a Bankrupt, v. The City Bank of New Orleans, 3 How 292. In that case, the opinion of this court in relation to the jurisdiction of the district court in matters of bankruptcy has been fully expressed, and need not be repeated here; and according to the principles therein stated, the decree of the circuit court in this case must be affirmed.

CATRON, J. I think the adjudication in this case is in conflict with that made in the circuit court at New Orleans, in Christy against the City Bank; and in support of which, a majority of my brethren saw proper to express their views at a previous day during this term, in the unsuccessful application of the bank for a prohibition; but that the * cases are alike, and one cannot be maintained [* 438] and the other overthrown.

In that case, the petition of the assignee set forth the entire legal grounds why the district court should annul the judgments in the state court, and pronounce the sale void.

1. That the property sold was given in by Walden, the bankrupt, as part of his effects.

2. That the bank had notice thereof, before the sale by the sheriff.

3. That the sale was void, being contrary to the bankrupt law, which operated to stay all further proceeding so soon as Walden's petition was filed, and was a bar to any further prosecution of the suit until an assignee should be appointed. That the sale with notice was a fraud upon the act of congress, and the other creditors of Walden, by reason of the law, because the bank was endeavoring to obtain an illegal preference.

4. That at the sale the property was struck off in blocks, although consisting of different buildings, at two thirds of its value: "All of which actings and doings are prohibited by law, and render said sale null and void."

5. That the sale was in other respects irregular, the legal formalities not having been observed.

6. That the mortgage was void for usury, because in effecting the loan, the bank gave Walden bonds on the Second Municipality,

instead of money, and they were then at a discount at from twenty to twenty-five per cent.

To these allegations the bank answered: —

1. By plea, that the district court was not by law empowered to decide on the matters charged.

2. That all the matters and things set forth had already been decided by a court of competent jurisdiction; referring to the adjudications by name.

3. The defendant answers, and avers, that the mortgage was legal and valid, and given upon a full and adequate consideration.

4. That the order of sale was duly granted, and the writ thereon properly issued; and that the property described in the petition was lawfully seized, and after a compliance with all the legal formalities, was sold, and adjudicated to the defendants; that the price was fully paid by giving a credit; and that the property is held under an infeasible title.

5. All the allegations in the petition not admitted, are denied, and a trial demanded of them.

This answer was excepted to as containing no legal grounds of defence; the question was adjourned, under the 6th section of the bankrupt law, to the circuit court, to be there heard and determined. It stood in that court as on bill and answer; the answer was taken of course as true in all its parts; the only question being [*439] whether any legal ground of defence was furnished by the plea, supported by an answer, denying the alleged unfairness of the sale, presenting the same question in substance as did the case of *Harpending v. The Dutch Church*, in 16 Pet. 455. By setting the case down on plea and answers, the proceedings in the supreme and inferior state courts were admitted of necessity to have been properly and fairly conducted, and the sale legally and fairly made. This was the undoubted aspect of the case as presented to and decided by the circuit court. Its decree, in the form of instructions to the bankrupt court, is, first: That the latter had full and ample powers to try all the questions presented in the assignee's petition. 2. That the sale made under the seizure by order of the state court, was void; and that the bankrupt court should declare it so. 3. That the bankrupt court had full power to retry the validity of the mortgage, and ascertain whether it was void for usury or otherwise; and this on the ground exclusively that the proceedings in the state courts were annulled by force of the bankrupt law, and the fact of *Walden* applying for its benefit.

Taking the petition and answer together, and a case existed in all its features like the present, on the title by execution; each being a

fair and regular proceeding in the state court. One is suppressed, and the other maintained. And on what ground does the district judge assume to act contrary to the former adjudication? Because it was equitable and for the best interests of the estate to be distributed, in his judgment. The obvious meaning of which is, that he had power to overthrow the title or not, at his discretion; and that such discretion was the law of the case and the tenure of the title, according to the true intention of the bankrupt act. On this assumption are the two cases attempted to be reconciled; and on no other can they avoid direct conflict, even in appearance. In reality, the one title is as good as the other. The tendency of such a doctrine is too threatening to titles to be silently acquiesced in. Did congress intend that the force and effect of judgments and executions in a state court, should depend on the sole discretion of a judge sitting in bankruptcy? Was it intended to discard the axiom, that unrestrained discretion in those that govern, is inconsistent with the rights of those that are governed, be they of property or person? It is very difficult to suppose so, and as difficult to accommodate the construction of the act to such a supposition. It is declared, "that it shall not be construed to annul, destroy, or impair any liens or mortgages, on property real or personal, which may be valid by the laws of the States respectively."

Here two liens are combined; one by mortgage, the other by execution levied. In *Christy v. The City Bank*, 3 How. 292, as already stated, that by mortgage was recognized as a right protected by the act, but to be administered in the bankrupt court only; that by execution was pronounced void. This decision the [*440] court below was asked to follow out, in the case before us, and refused.

By the execution levied, the lien "was valid by the laws of the State;" in the words of the saving clause, the remedy by seizure created the right; to annul, or to stay the execution, impaired a right, excepted out of the act. Since the opinions were delivered in the *ex parte* application of the City Bank, we have in effect so held at the present term, in *Waller v. Best*, 3 How. 111.

In making exceptions in favor of liens created by judgment and execution, congress was governed by practical considerations. The States usually were large, the bankrupt courts in many of them far off from the creditors, the debts owing by the bankrupt, small in amount to a great extent; for these recoveries would be had in the inferior courts, and before magistrates; the property would be seized by execution, and the debtor driven into bankruptcy; this step might be taken secretly. The officer having possession of the prop-

erty had to dispose of it according to the commands of the writ, and make return to the state tribunal; a return that the debtor had applied for the benefit of the bankrupt law, would not be a legal return, as I have held, and always supposed; and that a decree declaring the party a bankrupt, would not alter the case, as in either, the lien would be not only impaired, but destroyed where the levy alone gave it, as is the case in many instances. To drive the small creditor into the bankrupt court to establish his demand and effectuate his lien, would often have been worth more in trouble and expense than the debt, and in the mean time the property, being abandoned by the officer, and not taken possession of by the assignee, would in many instances perish. These facts were too palpable for congress to overlook. To protect such liens, I take it the exception was a compromise between the opponents and friends of the bill; the one side supporting rights secured by the state laws, and the other seeking to adopt a different rule under the constitution of the United States, in regard to the relation of debtor and creditor.

In many cases, the bankrupt might owe debts in other States than that where he would be declared bankrupt; then other difficulties would arise on executions being levied in the foreign jurisdiction, to which the powers of the bankrupt court could not extend. In all the cases enumerated, the assignee had given to him the same powers the bankrupt previously had, to sue and defend, and no material difficulty could arise (or has arisen) in adjusting the claims in the state courts, to which the assignee was bound to apply.

That a mortgage can be foreclosed in the bankrupt court, and the lien given by it be preserved there, I have never doubted, if the jurisdiction of a state court had not attached, and was not ousted by the proceedings in bankruptcy.

For the foregoing reasons, I think the court of Louisiana [* 441] was * mistaken when it assumed to have power to suppress the sale made by the sheriff, or to let it stand, at its discretion.

The decree is deemed entirely proper; nor would the reasons for it have been noticed, had not my brethren adopted them to the extent above, and with which adoption I cannot concur.

CHARLES H. CARROLL, Complainant, v. ORRIN SAFFORD, Treasurer of the County of Genesee, in the State of Michigan, Defendant.

3 H. 441.

By the law of Michigan, lands, for which patent certificates had issued, were liable to taxation, at their full value, as the property of the purchaser, though no patent had been issued, and such a law is valid under the constitution and laws of the United States.

THE case is stated in the opinion of the court.

Nelson, (attorney-general,) for the complainant.

Norvell, contra.

* M'LEAN, J., delivered the opinion of the court. [* 459]

The complainant filed his bill in the circuit court of the United States, in Michigan, stating that he is the owner in fee-simple of certain lands lying in Genesee county, amounting to three thousand five hundred and forty-nine and seventy-one hundredths acres, and of the value of \$7,500. That, in 1836, he entered these lands, paid for them, and received from the land-office a final certificate. Patents were issued for them on the 12th of August, 1837. That the delay in issuing the patents was not at the instance of complainant. Before the emanation of the patents, the lands were assessed for taxation, and sold by the defendant for the taxes thus assessed. Two years are allowed the owner to redeem the land by the act of Michigan, on the payment of the tax, charges, and interest, at the rate of twenty per cent. per annum. When this bill was filed, the time of redemption had not expired. The bill prays that the assessment and sale may be declared illegal and void, and that the defendant may be enjoined from conveying the land, and other relief, &c.

The case was considered as on a demurrer to the bill, and on the argument, the opinion of the judges were opposed on the following points : —

1. "Whether the statutes of the State of Michigan did, in fact, authorize the assessment and sale of the lands in question, and whether said statutes were intended to direct the assessment for taxation of lands of the United States, before the patents for them had been executed by the officers of the United States."

2. "Whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan."

3. "Whether, if they were subject to taxation by the State, before the execution of the patents for them, it was competent to assess,

and tax, and sell them, as the absolute property of the complainant, and at their full value, as if he owned them in fee."

4. "Whether the remedy by bill in equity, and the relief sought, are proper."

The 1st section of the act of the 22d of April, 1833, of the territory of Michigan, provides, "that the taxes hereafter to be levied in this territory shall be assessed, levied, and paid in the manner hereinafter mentioned, upon a valuation of real and personal estate," &c.

By the 2d section, the assessors of the different districts, "according to the best evidence in their power," are required to make out "a list or schedule of all the taxable property in the same," and bring the said lists or schedules together, and jointly value the property named in each, and set down in their assessment roll the value of buildings in such township, owned or possessed by any person residing in such township," &c. "And the assessors shall

[*460] *ascertain what lands are situated in their townships, not owned by persons residing in such townships, and shall, in their assessment rolls, separate from the assessments made the estates of non-residents, and designate such land in the following manner: if the estate be a patent or tract of land, of the subdivision of which the assessors cannot obtain correct information, they shall enter the name of the patent or tract, if known by any particular name, without regarding who may be the owner thereof; and if such tract be not known or designated by any particular name, they shall state by what other land the same is bounded, and shall set down the quantity of land contained therein in the proper columns for that purpose."

By the 14th section, the tax, interest, and charges thereon, constitute a lien on the land, though aliened, and unless paid within two years from the 1st of May succeeding the assessment of such tax, the treasurer of the proper county, after giving notice, is required to sell the same. And if the person claiming title to said lands shall not pay to the treasurer, for the use of the purchaser, his heirs or assigns, the sum paid by him for the lands, with interest at the rate of twenty per cent. per annum, the treasurer shall execute to the purchaser, his heirs or assigns, "a conveyance of the lands so sold, which conveyance shall vest in the person or persons to whom it shall be given an absolute estate in fee-simple," &c.; "and such deed may be given in evidence, and recorded in the same manner and with like effect as a deed regularly acknowledged by the grantor may be given in evidence and recorded."

It is first contended, "that the statutes of Michigan did not embrace the land in question, and were not intended to authorize their assessment."

In answer to this, it may be said that a different construction has been put upon the above statutes by the authorities of the territory, and also of the State since its admission into the Union. The practical construction of local laws is, perhaps, the best evidence of the intention of the lawmakers. The courts of the United States adopt, as a rule of decision, the established construction of local laws. And it cannot be material whether such construction has been established by long usage or a judicial decision.

But independently of the force of usage, we think the construction is sustainable. When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee.

It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but *not in equity. The land in the hands of the [*461] purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect, it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as real estate? In the words of the statute, "as lands owned by non-residents." And if the name of the owner could not be ascertained, the tract was required to be described by its boundaries or any particular name. We can entertain no doubt that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the lawmaking power.

But it is insisted, "that the lands in question were not, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan."

It is supposed that taxation of such lands is "an interference with the primary disposition of the soil by congress," in violation of the ordinance of 1787; and that it is "a tax on the lands of the United States," which is inhibited by the ordinance. Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the gov-

ernment had sold a tract of land, received the purchase-money, and issued a patent certificate, can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust.

But it is supposed that because on some certificates patents may not be issued, taxation of unpatented land is an interference "with the primary disposition of the land." And it is said that in the case of *Ostrom v. The Auditor-General of Michigan*, before the circuit court, in 1842, out of one hundred certificates patents were refused on fourteen of them; that those lands had been sold for taxes and conveyed under the statutes of Michigan; and that the United States either retain those lands or have conveyed them to third parties.

Michigan does not warrant the title to lands sold for taxes. The deed, by the express words of the statute, when duly executed and recorded, "may be given in evidence in the same manner, and with like effect, as a deed regularly acknowledged by the grantor," &c. The government has no right to refuse a patent to a *bonâ fide* purchaser of land offered for sale. But where there has been fraud, or mistake, the patent may be withheld, and every purchaser [*462] at a tax-sale *incurs the risk as to the validity of the title he purchases. He incurs the same risk after the emanation of the patent. But how this interferes with "the primary disposition of the public lands," by the United States, is not perceived. The sale for taxes is made on the presumption that the purchase from the government has been *bonâ fide*, and if not so made, the purchaser at the tax-sale acquires no title, and consequently no embarrassment can arise in the future disposition of the same land by the government.

It is known to be universally the practice in the west, where lands are purchased for a residence and cultivation, that the purchaser enters immediately into the possession of them. And it may also be observed, that in all the new States, lands, purchased of the United States, have uniformly been held liable to be taxed before they are patented. And, indeed, in Ohio, under the credit system, lands were taxed after the expiration of five years from the time of their purchase, although they had not been paid for in full. There was no compact made with Michigan, as with Ohio, not to tax lands sold by the United States until after the expiration of five years from the time of sale. The court think that the lands in question were liable to taxation under the authorities of Michigan.

It is contended, "that such lands should not be taxed at their full value, nor should they be sold as if the claimant owned them in fee."

The statute does provide that the conveyance, under a tax-sale, "shall vest in the purchaser an absolute estate in fee-simple," &c. Two years and more are required to elapse after the tax shall become due, before the land is liable to be sold; and the deed is not to be executed before the lapse of two years after the sale, during which time the owner has a right to redeem. This is a tardy proceeding, and gives ample time to non-residents for the payment of their taxes, &c. The land should be estimated at its full value, as the owner, having paid for it, is subjected to no additional charge for the obtainment of the patent. And although the statute may purport to give a higher interest in the land than the owner could convey, yet it does not follow that such title is inoperative. It must at least convey the interest which the owner has in the lands. Or it may be that a higher interest is conveyed. But whether such a conveyance shall take effect as in fee, under the statute, when executed, or when the patent shall be issued, or at any time, it cannot be necessary now to inquire. The only inquiry is, whether the land should not be estimated at its full value, and sold by the State for the tax regularly assessed upon it. The effect of the title is not now before us for consideration. The conveyance of real estate, whether by deed or by operation of law, is subject to the law of the State; and it is difficult to say that any restraint can be imposed upon the local power on this subject. It cannot, however, convey a better title to the land sold for taxes than the owner of such land, *to whom it stands charged, possessed at the [*463] time the taxes constituted a lien, or when the land was sold. Whether that legislature may not change the character of a title, so as to make that legal title which before was only an equity, is a very different question.

In the case of the Lessee of Wallace v. Semour and Renich, 7 Ohio, 156, the court held, "that a purchaser at a sale for taxes can acquire a right which can be enforced in equity, although he has been defeated at law." But that case grew out of the peculiar phraseology of the statute. It was also decided, that "where lands have been entered and surveyed in the military district, and sold for taxes before patented, that when patented, the patentee should hold the land subject to any claim which a purchaser at tax-sale may have in consequence of such sale." And in Lessee of Stuart v. O. Parish, 6 Ohio, 477, that a purchaser of land at a tax-sale, before a patent was issued, could not set up, in an action of ejectment, the

Lane v. Vick. 3 H.

tax-deed against the patentee. In *Douglass v. Dangerfield*, 10 Ohio, 156, the court say, in reference to taxing lands before the patent has been issued, "if the right to tax exists, and that it does there has not been any serious question for many years at least, it would seem to follow that the right to collect must also exist."

Under the Michigan statutes, we have no doubt, the lawmaking power intended to tax lands that had been entered and paid for, as the lands in question, and that it had the power to impose the tax. The nature of the title of such lands, under a tax-sale, not being involved in the points certified, we will not further discuss.

In regard to the fourth point certified, we entertain no doubt, that, in a proper case, relief may be given in a court of equity. This may be done on the ground to prevent a cloud from being cast on the complainant's title, or to remove such cloud; to prevent multiplicity of suits, or to prevent an injurious act by a public officer, for which the law might give no adequate redress. We answer all the questions certified in the affirmative.

3 H. 464; 4 H. 17; 9 H. 421; 4 Wal. 210.

JOHN LANE and SARAH C. LANE, Wife of the said JOHN, and ELIZABETH IRION, an Infant under twenty-one years, who sues by JOHN LANE, her next Friend, Complainants and Appellants, v. JOHN W. VICK, SARGEANT S. PRENTISS *et al.* Defendants.

3 H. 464.

A testator, after having made provision for his wife and sons, and directed his executors to lay off a portion of his lands into lots for the site of a town, declares: "I wish my executors to remember that the town lots now laid off and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs." The words "for the use, &c." appeared to have been interlined. *Held*, that sales were directed of all the lots, and not merely of enough to pay debts.

This court does not hold itself bound by the construction of a will of lands, made by the highest court of a State, unless the construction arises from a settled rule of property.

THE case is stated in the opinion of the court.

Ben Hardin, for the plaintiffs.

Crittenden, contra.

[*471] * M'LEAN, J., delivered the opinion of the court.

This case is brought here by an appeal from the decree of the circuit court for the district of Mississippi.

The complainants under the will of Newit Vick, late of the State of Mississippi, deceased, claim certain interests in a tract of two

hundred acres of land, on which the town of Vicksburg is laid off. In the bill, various proceedings are stated as to the proof of the will, the qualification of one of the executors named in it, the death of the executrix, and the refusal of one of the executors named to qualify; that the executor who qualified was afterwards removed, with his consent, and Lane, the complainant, appointed administrator, with the will annexed; that acting under the will, the administrator laid off the town of Vicksburg, sold lots, and paid the debts of the deceased; that there yet remains certain parts of the above tract undisposed of; and that his power, as administrator to sell the unsold lots, is questioned.

The defendants are represented as being interested in the above tract, as devisees and as purchasers; and the complainants pray that the court would decree a partition of the lots, commons, and Levee street, to be made between them and the other devisees of Newit Vick; and that said claimants shall be put in possession, &c., or the said property may be sold, &c., as shall best comport with the intent of the testator.

The defendants favorable to the object of the bill answered; the others demurred to the bill, which was sustained on the hearing, and the bill was dismissed, from which decree this appeal was taken.

The decision of this case depends upon the construction of the will of Newit Vick. It was proved the 25th of October, 1819.

* Every instrument of writing should be so construed as [*472] to effectuate, if practicable, the intention of the parties to it.

This principle applies with peculiar force to a will. Such an instrument is generally drawn in the last days of the testator, and very often under circumstances unfavorable to a calm consideration of the subject-matter of it. The writer, too, is frequently unskilful in the use of language, and is more or less embarrassed by the importance and solemnity of the occasion. To expect much system or precision of language in a writing formed under such emergencies, would seem to be unreasonable. And it is chiefly owing to these causes that so many controversies arise under wills.

In giving a construction to a will, all the parts of it should be examined and compared; and the intention of the testator must be ascertained, not from a part, but the whole of the instrument.

By the second paragraph of the will under consideration, the testator bequeathes to his wife one equal share of his personal property, to be divided between her and her children. This would give to his wife one half of his personal estate. But the succeeding paragraph qualifies this bequest so as to give to his wife a share of the personal property equal only to the amount received by each of his children

This shows a want of precision in the language of the will, and that one part of it may be explained and qualified by another.

In the second paragraph, the testator devises to his wife, during her natural life, "the tract of land at the Open Woods, on which he then resided, or the tracts near the river, as she might choose, reserving two hundred acres on the upper part of the uppermost tract to be laid off in town lots, at the discretion of his executrix and executors."

This discretion of his executrix and executors, referred to the plan of the town, and not to the propriety of laying it off. The testator had determined that a town should be established, and reserved for this purpose the above tract of two hundred acres, "to be laid off in town lots."

The testator next disposes of his personal property to his wife and children; and he says: "To my sons one equal part of said personal estate as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife Elizabeth; and I bequeathe to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received, shall be valued, considered as his, and as a part of his portion of my estate."

By these devises, Newit, on the death of his mother, was to have the tract selected by her for her residence. She died, it is [* 473] admitted, *in a few minutes after the decease of the testator, so that no selection of a residence was made by her. But this is not important as regards the intention of the testator. What lands did he devise to his sons Westley and William? The answer is, the land unclaimed by the wife of the testator. His words are: "Westley having one part, and my son William having the other part, of the tracts unclaimed by my wife Elizabeth." But what tracts may be said to come under the designation of "tracts unclaimed by my wife?" The land which, under the election given to her in the will, she might have claimed as a residence, but did not.

This claim by the widow was expected to be made shortly after the decease of the testator, as by it her future residence was to be established. If she selected the river land, then the Open Woods tract was to go, under the will, to Westley and William; but if the Open Woods tract were selected by the widow, then they were to have the river land. This devise being of the land unclaimed by the

widow, presupposes her right to have claimed it in the alternative under the will. It did not include the town tract, for that was expressly reserved by the testator from the choice of his wife. That this is the proper limitation of the devise to Westley and William, seems to be clear of doubt.

To Hartwell was devised the tract on which he lived, and which was to be valued.

These are the specific devises of his lands, by the testator, to his four sons. The tract of two hundred acres reserved for the town is not affected by them. Did this tract pass to his sons under the general devise of his lands to them, in the third paragraph of the will? That point will be now examined. The words of the testator are: "And to my sons one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years." The words, "all of my lands," unless restricted by words with which they stand connected, or by some other part of the will, cover the entire real estate of the testator. But these words are restricted by the part of the sentence which follows them, and also in other parts of the will.

"All of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years," follow the words "all of my lands," and show that the tract of two hundred acres was not intended to be included in this general devise. Such an intention was incompatible with the reservation of this tract for a town. In the second clause of the will are the words, "reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots." Now the testator could not have intended, in the next clause, to direct that this tract should be valued and divided among his sons. This would be repugnant to the authority given to his executors to lay off a *town, and [* 474] would have been an abandonment of what appears, from the last clause in the will, to have been, with him, a favorite object. Did he intend the tract of two hundred acres should be valued and divided among his sons, which he directed in another part of his will to be laid off into town lots, and sold by his executors? So great an inconsistency is not to be inferred. The general devise to his sons, "of all his lands," was limited to the lands which he directed to be valued and divided among his sons. This cannot be controverted, for it is in the very words of the will, and does not depend upon inference or construction. The special devises to each of his sons, which follow the general devise, also, in effect, limit it. These devises cover all the real property of the testator, except the town

tract, and show what he meant "by all his lands." He intended all his lands, which he subsequently and specially devised, and not the tract which, in the will, he had previously reserved and afterwards disposed of.

In the next clause of the will, the testator expresses his wish that the aforesaid Elizabeth should keep together the whole of his property, both real and personal, (reserving the provisions before made,) for the raising, educating, and benefit of the before-mentioned children.

These exceptions refer to the share of the personal property which each child was to receive when married, or at full age, and to the land appropriated for the town.

We have now arrived at the last clause of the will, under which clause this controversy has arisen. The testator has made provision for his wife, by giving her a life-estate in one of two tracts of land as she might select, and an equal share, with each child, of the personal property. To his sons, in addition to his share in the personalty, he has given to each a portion of his real estate. He has made no disposition of the tract reserved for a town, but proceeds to do so in the following and closing paragraph of the will:—

"I wish my executors furthermore to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs."

This clause is construed, by the appellees, to be a charge on the two hundred acres of land, for the payment of the debts of the testator only. And that the authority to the executors to sell lots is limited to this object. That as the personal property bequeathed to his heirs was first liable for the debts of the deceased, the charge on this tract may well be said, in the language of the will, to be "for the use and benefit of all his heirs."

That there is plausibility in this construction is admitted. It may, at first, generally strike the mind of the reader as reasonable and just. But a closer investigation of the structure of the [* 475] paragraph, * and a comparison of it with other parts of the will, with the view to ascertain the intention of the testator, must, we think, lead to a different conclusion.

If the object of the testator had been, as contended, merely to charge this tract with the payment of his debts, would the words, "for the use and benefit of all my heirs," have been inserted? The sentence was complete without them. They add nothing to its clearness or force. On the contrary, if the intention of the testator was to pay

his debts only, by the sale of lots to be laid off, the words are surplusage. They stand in the sentence disconnected with other parts of it, and consequently are without an object.

The testator directed that the town lots should be sold to pay his just debts, "in preference to any other of his property." This released his personal property, which he had bequeathed to his children, from all liability on account of his debts. And on the hypothesis that he only intended to do this, why should the above words have been added? They were not carelessly thrown into the sentence when it was first written. From the will, it appears they were interlined. This shows deliberation, and the exercise of judgment. Without this interlineation, the lots were required to be sold to pay debts, in preference to other property, in language too clear to be misunderstood by any one. It could not have been misunderstood, either by the testator or the writer of the will. But, as the paragraph was first written, it did not carry out the intention of the testator. To effectuate that intent the interlineation was made. The words, "for the use and benefit of all my heirs," were interlined. Does this mean nothing? This deliberation and judgment? Were these words added to a sentence perfectly clear, and which charged the land with the payment of the debts of the testator, without any object? Were they intended to be words of mere surplusage, and without effect? Such an inference is most unreasonable. It does violence to the words themselves, and to the circumstances under which they were introduced. No court can disregard these words, or the manner of their introduction.

The testator was not satisfied with the direction to his executors to sell lots for the payment of his debts, but he adds, "for the use and benefit of all my heirs." By this he intended that the lots should be sold for the payment of his debts, *and* "for the use and benefit of all his heirs." The omission of the word *and* has given rise to this controversy. Had that word been inserted with the others, no doubt could have existed on the subject. And its omission is reasonably accounted for by the fact of the interlineation. On such occasions, more attention is often paid to the matter to be introduced than to the word which connects it with the sentence. That the lots should be sold "for the use and benefit of all his heirs," after the payment of his debts, is most reasonable; but it cannot, with the same propriety of language, be said that the debts * of the testa- [* 476] tor were to be paid "for the use of all his heirs." The word use imports a more direct benefit. That the phrase was used in this sense we cannot doubt.

The clauses in the will preceding the one which is now under con-

sideration have been examined, and no disposition is found in any of them of the town tract. And if it be not disposed of in this last paragraph, after the payment of the debts, the remaining lots or their proceeds will descend generally to the heirs of the testator as personal property. The law will not disinherit the heir, on a doubtful devise. But we think the testator intended that the tract of two hundred acres should be laid out in lots and sold, "for the use and benefit of all his heirs," and "the payment of his debts and other engagements."

This construction of the will is strengthened by its justice to all the parties interested. That the testator intended to give to his sons a much larger part of his property than to his daughters, is evident. He gave to his sons an equal share with his daughters of his personal property. But did he intend to cut off his daughters from all interest in his real estate? He could not have had the heart of a dying father to have done so. He did not act unjustly to his daughters. They, equally with his sons, were devisees of the proceeds of the town lots, after the payment of all just debts and other engagements.

It is insisted that the construction of this will has been conclusively settled by the supreme court of Mississippi, in the case of *Vick et al. v. The Mayor and Aldermen of Vicksburg*, 1 How. Miss. 379.

The parties in that case were not the same as those now before this court, and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.

Where, as in the case of *Jackson v. Chew*, 12 Wheat. 167, the construction of a will had been settled by the highest courts of the State, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the supreme court of a State is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States. In the case of *Swift v. Tyson*, 16 [* 477] Pet. 1, *the effect of the 34th section of the judiciary act of

1789,¹ and the construction of instruments by the state courts are considered with greater precision than is found in some of the preceding cases on the same subject.

The decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings.

M'KINLEY, J. In this case I differ in opinion with the majority of the court, not only on the construction of the will, but upon a question of much greater importance, and that is, whether the construction given to this will by the supreme court of Mississippi is not binding on this court? I will proceed to the examination of these questions in the order in which I have stated them; and to bring into our view all the provisions of the will, which dispose of the real estate of the testator, I will state them in the order in which they stand in the will, unconnected with other provisions not necessary to aid in construing those relating to the real estate.

After the introductory part of the will, and providing for his funeral, the testator proceeds to dispose of his estate thus:—

“Secondly, I will and bequeathe to my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all my children, as her own right, and at her own disposal during her natural life; and also for the term of her life on earth, the tract of land at the Open Woods, on which I now reside, or the tracts near the river, as she may choose; reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots, at the discretion of my executrix and executors.

“Thirdly, I will and dispose to each of my daughters one equal proportion with my sons and wife, of all my personal estate, as they come of age or marry; and to my sons one equal part of said personal estate, as they come of age, together with all of my lands; all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeathe to my son Newit, at the death of my wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received, shall be valued, considered as his, and as part of his portion of my estate.

“Fourthly, It is, however, furthermore my wish that the aforesaid Elizabeth should keep together the whole of my property, both real and personal, reserving the provisions before made for the raising,

¹ 1 Stats. at Large, 92.

educating, and benefit of the before-mentioned children. I wish my executors, furthermore, to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred * acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs."

An inquiry which lies at the threshold of this investigation, is, what was the meaning and intention of the testator in reserving the two hundred acres of land, "to be laid off in town lots?"

Did he intend this tract of two hundred acres should not pass by his will, under the general description of "all my lands?" Or did he mean simply that it should be reserved from the use of his wife, in the event she selected the river tracts in preference to the Open Woods tract? Or did he intend, as the majority of the court have decided, that it should be reserved to be sold by his executors, for the purposes of paying his just debts and other engagements, "and" to increase the legacies of his daughters? To the last construction there is a very material objection. The power of the executors to sell the lots laid off, and to be laid off, on the two hundred acres, is not absolute, but contingent. The testator did not direct that any of his property, real or personal, should be sold for the purpose of paying his debts, or for any other purpose. But his meaning and intention, as manifested by the language employed, is, that if, in the administration of his estate, it should become necessary to sell any portion of it for the payment of his debts or other engagements, he wished his executors to remember that the town lots then laid off, and thereafter to be laid off, should be sold "in preference to any other of (his) property."

If the debts and other engagements could have been satisfied without a sale of the lots, the executors would have had no power to sell them for any purpose whatever; and the words "for the use and benefit of all my heirs," would have been inoperative for the purpose to which they have been applied; and the bounty, which it is supposed by the court a father's heart could not withhold from his daughters, would have been entirely defeated; and, in that event, the interpolation of the word "and," which has been supplied by the court, could not have conferred on the daughters the lots, nor the proceeds of the sale of them. But, conceding the power to sell the lots for the payment of the testator's debts, do the words "for the use and benefit of all my heirs," give any authority to the executors to sell the remainder of the lots, after paying the debts, or any right to the heirs to receive the proceeds of such sale?

The court seem to admit, by their reasoning, that these words

alone give no right to the heirs to claim the proceeds, nor power to the executors to sell the remainder of the lots, and therefore, they have supplied the word "and," to unite the power granted to sell for the payment of debts, with the words "for the use and benefit of all my heirs," which, they say, completes the right to receive the proceeds. If the court have the right to alter the will, and then give construction to it, they may make it mean what they please.

* But I deny the power of the court, in such a case as this, [* 479] to add the word "and." The rule is understood to be this :

where there is a supposed mistake or omission, all the court has to do is, to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission. *Mellish v. Mellish*, 4 Ves. 49. It appears to me these words are perfectly consistent with the other parts of the will, and are by no means repugnant to the main intention of the testator, but perfectly consistent therewith.

His intention, as manifested by all the provisions of the will, appears to be, to divide his personal estate equally among his sons and daughters and his wife, and to divide all his real estate, or lands, equally among his sons. That he intended each son to take an equal part of his lands, is proved by the direction to have each portion valued. That half of the Open Woods tract was not equal in value to the two river tracts, excluding the two hundred acres to be laid off into lots, is clearly proved by the will itself; because the testator gives his wife her choice of the Open Woods tract, or the two tracts on the river; and whichever she selects is, at her death, to go to his youngest son, Newit, and the other to be divided between his sons Westley and William; and he further directs that the part which his son Hartwell had received, should be valued, considered his, and as part of his portion of the estate. Here is a clear and unequivocal intention manifested to give to each son an equal portion of his real estate; and it is as clearly manifested that the specific portions given are not equal. To maintain the construction given to the will by the court, the two hundred acres are excluded from the devise of all the testator's lands to his sons. And the question arises, and ought to have been decided, how are these portions to be equalized? If the two hundred acres passed to the sons by the devise, subject to the payment of debts, then a reasonably certain contingent means was afforded for equalizing the portions, by dividing and valuing the lots not sold to pay debts, to make up deficiencies.

This view alone is sufficient to satisfy my mind that all the lands passed to the sons by the general words, "all of my lands, all of which

lands I wish to be appraised, and valued, and divided, when my son Westley arrives at the age of twenty-one years." Can the words "for the use and benefit of all my heirs," which in themselves contain no positive words of grant, control the previous, positive, and unconditional, grant of all his lands to his sons? It appears to me to be impossible to give such controlling influence to such words, upon any of the known and established rules of construction; and especially when they admit of a different interpretation, by which they would stand in perfect harmony with the other provisions of the will.

The accounts settled by the executor, with the orphans' [*480] court, * and which are part of the record exhibited in the bill of complaint, show that between \$25,000 and \$30,000 of the debts of the estate were paid by the proceeds of the cotton crops; which proves that a large portion of the personal estate consisted of slaves. Is it not reasonable, therefore, to suppose the testator had in his mind the disadvantages that would result to all his children, if he should leave his slaves liable to be sold for the payment of his debts, when he ordered the lots, which were unproductive, to be sold for that purpose, "in preference to any other of his property" which was productive? Acting upon this view of his affairs, is it at all surprising that he should have inserted in his will, even by interlining, the words, "for the use and benefit of all my heirs," that being the reason which induced him to charge the debts upon the town lots?

But putting out of view all extraneous considerations, can the construction given by the court to this part of the will be sustained upon principle? Executors have no authority to sell real estate, unless the power to sell, and the purpose of the sale, are expressed in the will. Therefore the court cannot infer, from a power expressly granted to sell the estate for one purpose, a power to sell it for another purpose not granted. *Hill v. Cock*, 1 Ves. & Beames, 175. In the case under consideration, the only authority given by the will to sell the town lots, was for the payment of debts; and there the power of the executors to sell any portion of the estate terminated. When they had sold as many of the lots as were necessary to pay the debts, the remainder fell into the general devise of all the lands of the testator to his sons; and the purposes of the testator, in relation to his real estate, were accomplished, according to his plain intention, when all the provisions of the will are taken together.

To reserve the remainder of the lots from the general devise, and to give effect to the interlined words, different from their plain meaning in the connection in which they stand with the other provisions of the will, the court revive the exhausted power of sale, and give capacity to all the heirs to take the proceeds of the sale of the re-

mainder of the lots, by inserting the conjunction "and" between the power to sell the lots for the payment of debts and the interlined words; thereby changing the meaning of the whole sentence. This certainly is not construing the will; but it is making a will, and giving this portion of the testator's estate to his daughters, which he plainly intended for, and gave to his sons.

This will was brought in question before the high court of errors and appeals of the State of Mississippi, in the case of Vick and others v. The Mayor and Aldermen of Vicksburg, 1 How. Miss. R. 442. The question before that court was, whether the land in controversy had been dedicated by Newit Vick, in his lifetime, to public purposes, or passed to, and was vested in his devisees by his will; and it is a part of the same land in controversy in the case * before this court; the court of Mississippi having concurrent [*481] jurisdiction of the subject-matter with this court, decided, that the whole of the real estate was devised to the sons of Newit Vick, deceased; and that his daughters were entitled to no part of the lots, nor any part of the proceeds of the sale of them. According to the constitution and laws of the United States and previous decisions of this court, I think this court was bound to follow the decision of that court upon the construction of the will.

The 2d section of the 3d article of the constitution of the United States declares: "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens, or subjects." In these three latter classes of cases, the jurisdiction of the courts of the United States is concurrent with the state courts. In this case it originated between citizens of different States, and is, therefore, concurrent with the courts of Mississippi. Before the jurisdiction here conferred on the courts of the United States could be exercised, it was necessary their powers and authority should be established and defined by law. And accordingly, by the 34th section of the act of congress of the 24th of September, 1789, it is enacted: "That the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States,

in cases where they apply." The purposes for which jurisdiction was given to the courts of the United States between citizens of different States in ordinary matters of controversy, between citizens of the same State claiming lands under grants from different States, and between an alien and a citizen of a State, was to give in each of these cases, at the option of the plaintiff, a tribunal, presumed to be free from any accidental state prejudice or partiality, for the trial of the cause.

And when congress defined the powers of the courts of the United States, they directed, that the laws of the several States should be regarded as the rules of decision in suits at common law, in cases where they apply. And upon these principles, with few, if any exceptions, has this court acted from the commencement of the government down to the present term of this court. That they should continue so to act, is of great importance to the peace and harmony

of the people of the United States. If the state judicial [*482] *tribunals establish a rule, governing titles to real estate whether it arise under statute, deed, or will, and this court establishes another and a different rule, which of these two rules shall prevail? They do not operate like two equal powers in physics, one neutralizing the other; but they produce a contest for success, a struggle for victory; and in such a contest it may easily be foreseen which will prevail.

The state courts have unlimited jurisdiction over all the persons, and property, real and personal, within the limits of the State. And as often as the courts of the United States have it in their power, by their judgments, under their limited jurisdiction, to turn out of the possession of real estate those who have been put into it by the judgment of the highest court of appellate jurisdiction of the State, so often that possession will be restored by the same judicial state power. To avert such a contest, and in obedience to the act of congress before referred to, this court have laid it down, in many cases, as a sound and necessary rule, that they should follow the state decisions establishing rules and regulating titles to real estate. And in the following cases they have applied the rule to the construction of wills, devising real estate. In *Jackson v. Chew*, 12 Wheat. 162, the principle is fully maintained. In that case the court say: "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court, that would be established by the state tribunals. This is a principle so obviously just, and so indispensably necessary under our system of government, that it

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cannot be lost sight of." The question in that case arose upon the construction of a will devising land in New York. In the case of *Henderson and Wife v. Griffin*, 5 Pet. 154, the court say: "The opinion of the court in the case of *Kennedy v. Marsh*, was an able one; it was the judicial construction of the will of Mr. Laurens, according to their view of the rules of the common law in that State, as a rule of property, and comes within the principle adopted in *Jackson v. Chew*, 12 Wheat. 153, 167." These cases are in strict conformity with the 34th section of the act of the 24th September, 1789, above referred to.

There are many other decisions of this court applicable to this case; some of them have followed a single decision of a state court, where it settled a rule of real property. And at the present term of this court, in the case of *Carroll v. Safford, treasurer, &c.*, 3 How. 441, it was held, that it was not material whether it had been settled by frequent decisions, or a single case. From these authorities, it is plain, the jurisdiction of this court is not wholly concurrent in this case with the supreme court of Mississippi; but in power of judgment it is subordinate to that court, and, therefore, the construction * given by that court to the will ought to have been [*483] the rule of construction for this court.

TANEY, C. J., concurred in the opinion of M'KINLEY, J.¹

5 H. 343.

FRANCIS C. BLACK and JAMES CHAPMAN, Plaintiffs in Error, v. J. W. ZACHARIE and Co. Defendants.

3 H. 483.

The circuit court may quash a writ of *supersedeas* granted upon an appeal, if it becomes satisfied that sufficient security was not taken, and this court cannot review its proceeding, or issue a new writ of *supersedeas*, upon an inquiry and finding that the security was sufficient.

A consignee, who has sold merchandise of the consignor, and received its proceeds, but who has accepted bills drawn against those proceeds, which are not yet at maturity, or are in the hands of third persons, for value, cannot be sued by the consignor for those proceeds.

A provision in the charter of a corporation that transfers of its stock shall be made only on its books, is for the benefit of the corporation, and *bonâ fide* purchasers; third persons cannot take advantage thereof. It applies only to transfers of the legal, not of the equitable title.

Though the positive or customary law of the place where the corporation is created governs the transfer of its shares, yet if there be no positive or customary law to the contrary, a transfer good by the law of the place of the owner's domicile is valid everywhere.

¹ STORY, J., was absent.

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Wilde moved for a *supersedeas*. Upon this motion, Mr. Justice STORY delivered the opinion of the court.

[*494] * This is a case coming by a writ of error to this court, from the circuit court of the eastern district of Louisiana. The case has not as yet been heard upon the merits, but a motion has been made in behalf of the plaintiffs in error, (the original defendant and the intervenor,) for a writ of *supersedeas* to the execution issued upon the judgment against Black, upon two grounds ; first, that the execution issued improvidently, because, within the ten days allowed by law, the writ of error had been prayed for, citation issued, and bond given, with adequate security ; secondly, that after the [*495] execution issued, * and certain stocks had been seized thereon, and before the sale thereof by the marshal, Black (who is a citizen of South Carolina) applied for the benefit of the bankrupt act to the district court of South Carolina district, and was afterwards declared a bankrupt, and an assignee appointed ; and that, in the intermediate period, the marshal sold the stocks.

Upon examining the record, we find that, although the writ of error had been allowed by the circuit court, and a citation issued, and bond given for prosecution of the writ of error and payment of costs, and a *supersedeas* had afterwards been awarded to stay execution, yet that the court upon the succeeding day revoked that order, upon the ground that the stocks attached were not a sufficient security for the said writ of *supersedeas*, and that the bond was insufficient ; so that the case does not fall within the predicament provided for in the 22d and 23d¹ sections of the judiciary act of 1789, c. 20, which entitles the party to a *supersedeas* and stay of execution, since that can only be where, within the ten days allowed by law, a sufficient bond is given to prosecute the writ of error to effect, and also to answer all damages and costs. The judges of the circuit court were the sole and exclusive judges what security should be taken for that purpose ; and they have decided that the security offered was insufficient.

In respect to the other ground, that of the bankruptcy of Black, that of itself constitutes no ground why this court should interfere to stay proceedings on the execution, or to award a *supersedeas*. It is a matter, if at all cognizable, properly cognizable in the circuit court, upon an application and petition, by the assignee, to that court, upon a case showing an equitable title to relief ; or for an application to the proper district court, sitting in bankruptcy for that purpose. It is in no respect a matter within the appellate jurisdiction of this court, upon the present writ of error.

The motion is therefore overruled.

¹ 1 Stats. at Large, 84.

The case was then argued upon its merits by

Wilde, for the plaintiffs.

Coxe, contra.

The facts appear in the opinion of the court.

* STORY, J., delivered the opinion of the court.

[* 509]

This is a writ of error to the circuit court of the United States for the eastern district of Louisiana. The original suit was brought in the state court, against Black alone, upon an attachment issued by Zacharie and Company against him, he being a citizen of South Carolina, and not resident in Louisiana; and upon this attachment certain shares of Black, in the Carrollton Bank, and the Gas Light and Banking Company, in Louisiana, were attached, to answer the exigency of the writ. Black appeared in the suit, and caused it to be removed into the circuit court. Black, upon his appearance, pleaded that prior to the attachment he had assigned the attached stock to James Chapman, of South Carolina, by a trust-deed, for the benefit of all his creditors. After the removal of the suit into the circuit court, Chapman filed an intervention according to the Louisiana practice, and became a party to the suit to protect his interest under the trust-deed. In his petition of intervention he asserted his title, and that he had given due notice thereof to the Carrollton Bank, and the Gas Light and Banking Company; and that Zacharie and Company had due notice thereof before their attachment.

The cause was tried by a jury upon the pleadings in the case; and upon the trial it was proved that the assignment was made by the trust-deed in South Carolina, by Black to Chapman, on the 28th of April, 1841. The attachment of Zacharie and Company was made on the 4th of May, 1841, with a full knowledge of the assignment. Long before the attachment, the stock in the Carrollton Bank had been transferred and pledged to the Carrollton Bank, for a stock loan, and was then held by that bank, under that transfer, the equity of *redeeming the same only remaining in Black. [* 510] On the 15th of April, 1841, Black had executed a letter of attorney to the cashier of the Gas Light and Banking Company, to transfer the same to the Bank of South Carolina, of which notice was sent on the next day to the Gas Light and Banking Company, and notice was received by the latter on the 22d of April; but owing to some informality in the letter of attorney, the transfer was not

then made, but the paper was sent back to be corrected, the company then agreeing to transfer it when the informality was corrected. The Bank of South Carolina was a holder of the stock, under this power, for value; and of this transaction also Zacharie and Company had notice before their attachment.

At the trial, the jury found a verdict for the original plaintiffs, and judgment thereupon passed for them. Two bills of exceptions were taken to the ruling of the court at the trial, and upon these exceptions the cause has been brought before this court.

It does not seem necessary to recite at large the matters contained in these exceptions. They give rise to two questions, which have been fully argued at the bar, although very inartificially presented in the record: First, whether at the time of the commencement of the suit of Zacharie and Company there was any debt due to them, upon which the attachment could, under the circumstances, be maintained? Secondly, whether the assignment to Chapman, being made in South Carolina, and known to Zacharie and Company at the time of their attachment, and being, by the laws of South Carolina, a good and valid assignment, is entitled to a priority over the attachment. The latter question, so far as it respected the notice to Zacharie and Company, and the equity of the assignee, is not so precisely put as it is obvious it was intended to be, in the instructions asked by the intervenor. But it is plain, from the qualifications of those instructions suggested by the court, that the court held that the delivery of the stock was not complete, and that the assignment did not pass the right to the stock to the assignee, unless the transfer was entered upon the books of the bank, notwithstanding the notice; and that the law of Louisiana upon the point was different from that of South Carolina. In this way only is the verdict at all reconcilable with the admitted state of facts.

In respect to the first question, it is plain to us that there was no debt due to Zacharie and Company, at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by Black on account of Zacharie and Company. Assuming those proceeds to be due and payable, Zacharie and Company had drawn certain bills of exchange upon Black, which had been accepted by the latter, for the full amount of those proceeds; and all of these bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Zacharie and Company, until after those [* 511] bills had become due and dishonored, and * were taken up by Zacharie and Company. It amounted to a new credit

to Black for the amount of those acceptances, during the running of the bills, and gave Black a complete lieu upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored.

Whether the transactions by the drawing and acceptance of these bills amounted to a novation of the debt, which might otherwise be due under the account current for the sales of the sugar and molasses, it is not necessary to decide; for, assuming that these transactions might be treated as a conditional novation only and not as an absolute novation, it would make no difference in the conclusion to which we should arrive under the circumstances of this case.

It is true that the statute law of Louisiana allows, in certain cases, an attachment to be maintained upon debts not yet due. But it is only under very special circumstances; and the present case does not fall within any predicament prescribed by that law. The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not; nor to any case except of absconding debtors; and this, therefore, is a case not governed by it. We think, then, that there was error in the ruling of the court, in admitting that there was a sufficient debt established by the evidence to maintain the attachment.

The other point is one of much greater importance, although in our judgment not attended with any intrinsic difficulty. We admit, that the validity of this assignment to pass the right to Black in the stock attached depends upon the law of Louisiana and not upon that of South Carolina. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign state. And in the present case, if the local law of Louisiana had prohibited (as we think it had not) any assignment of an equitable interest in the stock attached, we should not have scrupled to have followed that law. The question is not here, whether the legal interest in the stock passed by the assignment before a transfer of the stock upon the books of the corporations; but whether the equitable interest therein, as contradistinguished from the legal interest, did not pass to and vest in the assignee by the law of Louisiana, so as to oust the right of any creditor with full notice of the assignment from divesting the title of the assignee by a subsequent attachment thereof as the property of the debtor. In respect to the Carrollton Bank it is clear that nothing but an equitable interest could be conveyed or was intended to be conveyed by the assignment; for the bank already held the legal title as a pledge for a stock loan.

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In respect to the Gas Light and Banking Company, the interest in the stock had been transferred to the Bank of South Carolina as a pledge, and the letter of attorney was given to perfect the [* 512] equitable *title into a legal title by an actual transfer on the books of the corporation. But, subject to that pledge the equity was with the consent of the Bank of South Carolina vested in the assignee under the assignment. So that each case presented the same general question as to the validity of the equitable title by the law of Louisiana against attaching creditors, having full knowledge of that equity. Out of Louisiana, we believe, that no such question could possibly arise; for courts of law, as well as courts of equity are constantly, in all States where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment.

Upon full examination of the laws of Louisiana and the decisions of its courts, we see no reason to believe that a different doctrine on this subject prevails in that State. It is true that the same distinctions between legal and equitable rights may not as to the mode of remedy exist in that State, which are recognized in States governed by the common law; but the same purposes of substantial justice are attained there under similar circumstances as the courts in other States are accustomed to administer in a different form.

There is a marked distinction, in the Louisiana law, between the transfer of corporeal things movable, and things incorporeal. In the former, a manual tradition of the thing is ordinarily but not universally required to perfect the title. In the case of incorporeal things no such tradition can take place, and therefore such a delivery as the thing admits of—a sort of symbolical delivery—is admitted by the law as a substitute. There are several articles of the civil code of Louisiana bearing directly on this point; but it will be sufficient only to cite a few of those which have been relied on by counsel. Art. 2612 declares: “In the transfer of debts, rights, or claims, to a third person, the delivery takes place between the transferrer and transferee by the giving of the title.” Art. 2613 declares: “The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place.” Art. 2457 declares: “The tradition of the incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser with the consent of the seller.” In *Bainbridge v. Clay*, 16 Martin, 56, the supreme court of Louisiana said: “A debt due [by] the defendant on a *feri facias* cannot, as to third persons, completely pass to the assignee unless there be

what in sales of tangible property is called a tradition or delivery ; and this is effected as to *choses in action* by notice of the assignment to the debtor." Again, in *Babcock v. Malbie*, 19 Martin, 137, the same learned court said that the true test, in cases of assignment is : " That where the owner of the property has lost all power over it, and cannot change its destination, the creditors cannot attach." The same doctrine was directly *affirmed in the [* 513] recent case of *Urie v. Stevens*, 2 Rob. Louis. 251. The principles announced in these decisions seem completely to cover the present suit. In the case of the Carrollton Bank, the shares had actually passed to the bank itself as a pledge, and nothing but an equity remained in Black, capable of being transferred, and that was assigned by the deed of assignment to the assignee before the attachment, and was known to Zacharie and Company, at the time when they made their attachment ; and at least as early as the next day it was made known to the bank. So that the creditors had full notice, and the bank had full notice ; and the creditors could not make a valid attachment when to their knowledge the property no longer belonged to their debtor. The case as to the Carrollton Bank falls, then, directly within the principles just stated. The owner had parted with all his property in the stock ; he had lost all power over it ; and he could not change its destination. The same principles apply, *à fortiori*, to the Gas Light and Banking Company ; for there, not only had the creditors notice of the assignment before their attachment ; but the company also had notice thereof before that period.

It is true that the charters of the Carrollton Bank and of the Gas Light and Banking Company provide that no transfer of the stock of these corporations shall be valid or effectual until such transfers shall be entered or registered in a book or books to be kept for that purpose by the corporation. But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. In the case of the *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, this court took notice of the distinction between the legal and equitable title in cases of bank stock, where the charter of the bank had provided for the mode of transfer. The general construction which has been put upon the charters of other banks containing similar provisions as to the transfer of their stock, is, that the provisions are designed solely for the safety and security of the bank itself, and of purchasers without notice ; and that as between vendor and vendee a transfer, not

in conformity to such provisions, is good to pass the equitable title and divest the vendor of all interest in the stock. Such are the decisions in the cases of *The Bank of Utica v. Smalley*, 2 Cowen, 777, 778; *Gilbert v. Manchester Iron Co.* 11 Wend. 628; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 362; *Quiner v. The Marblehead Insurance Co.* 10 Mass. 476; and *Sergeant v. Franklin Insurance Co.* 8 Pick. 90.

We see no reason to doubt that the jurisprudence of Louisiana adopts a similar interpretation for the purpose of protecting equitable title against the claims of creditors of the transferrer, who have notice of such equitable titles. If it will protect an assignment [* 514] of * a *chose in action* against attaching creditors after notice of the assignment given to the debtor, because no title remains in the transferrer, (as we have seen it will,) *à fortiori*, it ought to protect it where the attaching creditor himself has notice, since, in justice, he is entitled only to take under his attachment what rightfully remains in the transferrer. In the absence of any positive controlling statute or direct adjudication of the courts of Louisiana upon the very point, in contradiction to the doctrine maintained in other States, as one founded *ex æquo et bono* in general justice, we may well presume that a State deriving its jurisprudence from the Roman law, has not failed to act upon it.

There is another ground, auxiliary to this last view, which is entitled to great consideration. It is well settled as a doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary. This doctrine has, in the very late case of *The United States v. The United States Bank*, (in June, 1844, 8 Rob. Louis. 262,) been fully and directly recognized and affirmed by the supreme court of Louisiana, as a part of its own international jurisprudence; and it was applied in that very case to support an assignment made in Pennsylvania, by the Bank of the United States, to certain assignees, who were intervenors of goods, debts, credits, and effects, in Louisiana. The court held that the assignment, being proved to be valid and effectual by the law of Pennsylvania, was to be deemed equally valid and effectual to pass the goods, debts, credits, and effects of the bank, to the assignees in Louisiana, against the attaching creditors, who had notice of the assignment at the time of their attachment. The decision turned upon the very doctrine of international jurisprudence just referred to. So that here we have the high authority of the state court in this very matter, that there is nothing in the jurisprudence

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of Louisiana, which forbids giving full effect and validity to an assignment of debts, credits, and equities, situate in that State, where the assignment is valid and effectual by the law of the State where it is made, so as to oust the rights of attaching creditors who have due notice thereof. Now, in the case before us, there is plenary evidence that the assignment was valid and effectual by the laws of South Carolina, when and where it was made, to pass the right to the property in controversy; and that the attaching creditors had notice thereof before their attachment was made; so that its validity and effect are the same in Louisiana as in South Carolina. It is true that the legal title could not pass without a regular transfer of the stocks upon the books of the corporation; but it is equally true, that the title to the property, subject to the pledge thereof, was complete in the assignee, so as to bind the banks as well as the attaching creditors, after due notice to them respectively. We are, *therefore, of opinion, that the district judge erred in [* 515] directing the jury that the delivery of the stock was not complete unless the transfer was entered upon the books of the banks. That was true as to the absolute legal title, but it did not prevent the equitable title from passing to and becoming completely vested in the assignee under and in virtue of the assignment, so as to bind the attaching creditors, as soon as they had notice thereof, and in like manner the banks, as soon as they had notice thereof.

Upon both grounds, therefore, stated in the exceptions, the judgment of the circuit court is reversed, and the cause remanded to that court with directions to award a *venire facias de novo*.

JOHN B. CAMDEN, Plaintiff in Error, v. THOMAS C. DOREMUS, CORNELIUS R. SUYDAM, JAMES SUYDAM, and JOHN M. NIXON, Defendants in Error.

3 H. 515.

A naked statement on the record that the reading of a deposition, or copy of a record, was objected to, without disclosing the nature or ground of the objection, is nugatory and wholly ineffectual in a court of error.

Under an agreement between the third indorser and the indorsee, that the latter should send the note to the bank, where it was made payable, for collection, and in the event of its not being paid at maturity the indorsee should use due diligence to collect it from the maker and prior indorsers. *Held*, 1. That evidence of a usage of any banks except that at which the note was payable, was not admissible. 2. That the presentment of the note at that bank, and demand of payment there, when the note came to maturity, was a compliance with that part of the contract respecting the sending it for collection to that bank. 3. That an honest prosecution of a suit against the maker and prior indorsers, to a judgment and the return of *nulla bona* and proof of actual insolvency and absence from the State were due diligence, though executions were not sent into all the counties where all the defendants resided, and by an erroneous ruling of the court that judgment was for a less sum than should have been recovered.

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ERROR to the circuit court of the United States for the district of Missouri.

The case is stated in the opinion of the court, save that the agreement referred to was as follows:—

* 516]

“New York, August 22, 1836.

“Memorandum of an agreement and trade made by and between Doremus, Suydams, and Nixon, of the city of New York, of the one part, and J. B. and M. Camden, of the city of St. Louis, of the other part, witnesseth: Whereas, the said Camdens have this day sold and assigned unto the said Doremus, Suydams, and Nixon, a note for \$4,219.90, payable twelve months after date, and dated the 8th day of June, 1836, and negotiable and payable at the Commercial Bank of Columbus, Miss. Executed by Ewing F. Calhoun to Judah Barrett, and indorsed by the said Judah Barrett and Sterling Tarpley and J. B. and M. Camden. Now, it is expressly understood and agreed by the contracting parties, that the said Doremus, Suydams, and Nixon, are to send the said note to the said Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they are to use reasonable and due diligence to collect it of the drawer and two indorsers before they call upon the said Camdens; but in the event of its not being made out of them, then the said Camdens bind and obligate themselves, so soon as informed of the fact, to pay the said Doremus, Suydams, and Nixon, the principal of the said note, together with its interest and all legal costs they may have incurred in attempting its collection.

“J. B. and M. CAMDEN,

“DOREMUS, SUYDAMS, and NIXON.”

Hardin, for the plaintiff.

Lee, contra.

[* 529] * DANIEL, J., delivered the opinion of the court.

No question has been raised on this record in reference to the original character of the instrument on which the action was founded as a negotiable and commercial paper, nor in reference to the duties and obligations of the parties arising purely from their positions as parties to such a paper. And for aught that the record discloses,

every requirement of the law merchant, with respect to the

[* 530] note, or * with respect to the rights of the indorsers thereof,

appears to have been fulfilled. Presentment at maturity and within due time was made at the Bank of Columbus, Mississippi, and payment there demanded; the failure to make payment

was followed by regular protest, and by like notice to all the indorsers. The exceptions specifically urged by the defendant in the court below, and pressed in his behalf before this court, grow out of an agreement signed by the firm of the Camdens and by the defendants in error at the time that the note of Calhoun was indorsed by the former to the latter, and which agreement, it is contended, bound the defendants in error to undertakings and acts beyond the usual duties incumbent upon indorsers and holders of negotiable paper, and without the fulfilment of which no right of recovery against the plaintiffs in error could arise. Before entering upon an examination of this agreement and of the questions which it has given rise to, it is proper to dispose of an objection by the defendant in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether at its competency, or relevancy, or at its regularity merely, that objection nowhere discloses. After each deposition offered in evidence by the plaintiffs to the jury, it is stated, that to the reading of such deposition the defendant, by his counsel, objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds county against Calhoun, the maker of the note, and offered in this cause as proof of due diligence. With regard to the manner and the import of this objection, we would remark, that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on; and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance; or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and as, if entitled to weight anywhere, certainly, as without weight before an appellate court.

Camden v. Doremus. 3 H.

[*531] * Recurring to the agreement signed by the parties at the time of the transfer of the note, and to the instructions given and refused at the trial, with respect both to that agreement and the proceedings had in fulfilment, thereof, we will remark, as to the agreement itself, it is clear that it bound the indorsees to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments. Their obligations, therefore, to these indorsers could by no means be fulfilled by a compliance with such usual conditions. The language of the agreement is explicit. The said Doremus, Suydams, and Nixon were to send the note passed to them to the Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they were to use reasonable and due diligence to collect it of the drawer and two previous indorsers before they were to call upon the said Camdens, &c. &c. The obligation of the plaintiffs, as indorsees and holders, would have been fulfilled by regular demand, protest, and notice; from these a right of action would immediately have accrued. But the condition stipulated in the agreement is, that before they can have any right to make demand upon their indorsers, they shall diligently endeavor to collect of the maker and previous indorsers. With the view of showing a failure in the plaintiffs in fulfilling their contract, and of deducing therefrom their own exemption from responsibility, the defendants first offered a witness to prove a difference in the practice prevailing in eastern and western banks with respect to the management of paper deposited with them for collection; and inquired of the witness whether a note, presented at a bank for payment on the last day of grace by a notary public, would be considered as having been sent to the bank for collection, within the meaning of the contract. This question, on motion of the plaintiff's counsel, the court refused to allow, and rejected all testimony by the witness in relation to the practice of banks as to notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus. The ruling of the court on this point we think was proper. The note was made payable at the Commercial Bank of Columbus; by the agreement between the parties, it was moreover expressly stipulated that it should be sent to that bank for collection; if, then, any custom or practice other than general commercial usage were to control the management of the note, it was the usage of the Bank of Columbus, certainly not the particular usage of other banks not mentioned in the contract, and perhaps never within the contemplation of the parties to that contract. The next exception is taken upon an instruction asked of the court to the jury, that, unless it was proved to

their satisfaction, that the note was sent to the Bank of Columbus for collection by the plaintiffs, they must find for the defendant. The court responded affirmatively to the proposition that the note should have been sent to the Bank of Columbus for collection, but declared *its opinion that by presentment and demand of [* 532] payment of the note at maturity by the plaintiffs at the said bank, within banking hours, so as to make a legal demand on the makers, the requirement of the contract in this particular would be complied with. A nice distinction might be made between the language of the agreement and that of the instruction given upon this point. The distinction, however, we should deem to be more apparent and verbal than substantial, and not to be applicable either to the intention of the parties, or to the real merits of the case. The note was payable at the Commercial Bank of Mississippi. The maker of the note resided in the county in which the bank was situated; the indorsers, Barrett and Tarpley, who were to be looked to for payment before proceeding against the Camdens, were also residents of the State of Mississippi. Every party upon the note must be presumed to have been cognizant of its character, and to have known when and where it was payable; and was bound to prepare for his respective responsibility arising from his undertaking. Other notice than that to which the law entitled him from his peculiar position upon the note, he had no right to claim. It would be going too far, then, to imply any other right, or to admit it upon ground less strong than that of express and unequivocal contract. The language of the agreement we hold not to amount to this, and as being satisfied with the interpretation that the note should be regularly presented and payment thereof demanded at the Commercial Bank of Columbus, simply as one of the means of collection to be adopted before recourse should be had to the last indorsers.

But it has been contended that, had the note been placed under the management of the bank itself, notice might have been given by the bank to the maker and prior indorsers, before the maturity of the note; and that, thereby, provision might have been made to meet it when due. In reply to this argument, it may be said, that the agreement itself expresses no such purpose or object, in requiring the note to be sent to the bank, and we do not think that such an object is necessarily implied in the requisition. In the next place, there is no proof that the bank would have given notice to the maker and indorsers, previously to the maturity of the note; nor is there any thing in the record to show that this would have been in accordance with its practice in similar cases. Under the silence of the contract itself, and in the absence of proof *dehors* the agreement, we are not at

liberty to set up a presumption, which neither the language of the agreement nor justice to the parties imperatively calls for.

The defendants also excepted to the opinion of the court, given upon a prayer to instruct the jury, that the record of the suit by the plaintiffs, against the maker and prior indorsers of the note, did not show due diligence as to those parties. This instruction the court refused, but, in lieu thereof, instructed the jury, that the record was proper evidence to show due diligence on the part of the [* 533] plaintiff, * and that if they believed, from the evidence submitted in addition to the record, that the indorsers, Barrett and Tarpley, had left the State of Mississippi, were insolvent, and had left no property in the State at the time of the judgment in the said record, the plaintiffs were not bound to send executions to the counties in which those indorsers respectively resided at the time when the suit was instituted against them. This court can conceive no just foundation for this exception to the ruling of the circuit court. The condition to which the plaintiff was pledged, was the practice of due, that is, proper, just, reasonable diligence; not to the performance of acts which were obviously useless, and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence.

This phrase, and the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit, evidence which, in instances that it may be easy to imagine, might prove prejudicial alike to him who should exact and to him who would supply it. *Dulany v. Hodgkin*, 5 Cranch, 333; *Violet v. Patten*, Ibid. 142; *Yeaton v. Bank of Alexandria*, Ibid. 49. We hold, therefore, that, both as to the instruction refused and as to that which was given upon this prayer, the decision of the circuit court was correct.

We come now to the last exception taken to the opinion of the circuit court upon the points presented to it. The defendant in that court insisted that, by the law of Mississippi, the plaintiffs were entitled to a recovery of the full amount of the note, against the maker and indorsers, subject to no set-off between the maker and indorsers; and that, if the plaintiffs had, by their neglect, permitted a judgment for a smaller amount, the defendant was discharged from all accountability for the sum thus lost. The court refused so to lay down the law, because the record from the court in Mississippi furnished the

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only evidence to which the instruction prayed for referred, and no negligence appeared from the record in the prosecution of the suit against the defendants thereto. This refusal of the court was clearly right, and the reason assigned for it is quite satisfactory. The question to which the instruction asked was designed to apply was that of due diligence. The timely and *bonâ fide* prosecution of a suit is, perhaps, the highest evidence of due diligence. If, in the conduct of that suit, the party should be impeded or wronged by an erroneous decision of the tribunal having cognizance of his case, that wrong could, on no just principle, be imputed to him as a fault. It certainly does not tend to show him to have been the less diligent in the pursuit * of his claim; and least of all should he be prejudiced [* 534] thereby, when the error insisted on has been induced by the person who seeks to avail himself of its existence.

Upon the whole, we consider the rulings of the circuit court upon the several points before it to be correct. Its judgment is, therefore, affirmed.

18 H. 517.

UNITED STATES v. ANDREW HODGE.

3 H. 534.

On motion of the defendant, this suit was dismissed because the citation was signed by the clerk and not by a judge, pursuant to the requirement of the 22d section of the judiciary act of 1789, (1 Stats. at Large, 84.)

Motion to dismiss.

TANEY, C. J., delivered the opinion of the court.

This case is brought here by a writ of error to the circuit court for the eastern district of Louisiana, and a motion has been made to dismiss it, because the citation was signed by the clerk, and not by a judge of the circuit court, or a justice of the supreme court, as directed by the act of congress of 1789, c. 20, § 22.

The defendant is not bound to appear here, unless the citation is signed in the manner prescribed by law; and, as that has not been done in this case, the writ must be dismissed.

6 H. 81; 18 H. 478; 16 H. 869; 3 Wal. 46.

THE STATE OF MARYLAND, FOR THE USE OF WASHINGTON COUNTY,
Plaintiff in Error, v. THE BALTIMORE AND OHIO RAILROAD COM-
PANY, Defendants.

3 H. 534.

The State of Maryland passed a law to subscribe \$1,000,000 to the stock of the Baltimore and Ohio Railroad Company, and providing that, if the road should not be located so as

not to pass through certain towns in the county of Washington, the company should forfeit \$1,000,000 to the State, for the use of Washington county. The company assented to this law, as part of its charter. *Held*, that this was a law inflicting a penalty; that nothing was due to the county by contract, and that the State could release and had released the penalty by a subsequent law to that effect.

THE case is stated in the opinion of the court.

Jervis Spencer and *Sergeant*, for the plaintiff.

Nelson (attorney-general) and *Johnson*, contra.

[* 548] * TANEY, C. J., delivered the opinion of the court.

The question brought before the court by this writ of error depends upon the construction and effect of an act of the general assembly of Maryland, passed at December session, 1835, entitled "An act for the promotion of internal improvement."

The original charter of the Baltimore and Ohio Railroad Company authorized it to construct a railroad from Baltimore to some suitable point on the Ohio River, without prescribing any particular route over which the road was to pass, leaving the whole line to the judgment and discretion of the company. But by the act above mentioned the State proposed to subscribe \$3,000,000 to its capital stock, provided the company assented to the provisions of that law; and, among other provisions, this act of assembly required the road to pass through Cumberland, Hagerstown, and Boonsborough, and provided also that, if the road was not located in the man-

[* 549] ner therein *pointed out, the company "should forfeit \$1,000,000 to the State, for the use of Washington county."

The towns of Cumberland, Hagerstown, and Boonsborough are all situated in Maryland, the first in Alleghany county and the two latter in Washington.

This law was assented to by the company, and became obligatory upon it, and the sum proposed was subscribed by the State; but, for reasons which it is not necessary here to mention, the company did not locate the road through Hagerstown or Boonsborough, nor pass through any part of Washington, on its way from Harper's Ferry to Cumberland, to which point the road has been made; and this suit was thereupon brought, at the instance of the commissioners of Washington county, in the name of the State, for the use of the county, to recover the \$1,000,000 above mentioned. After the suit had been instituted, the State, at December session, 1840, passed a law repealing so much of the act of 1835 as required the company to locate the road through Hagerstown and Boonsborough, and remitting the forfeiture of the \$1,000,000, and directing any suit instituted to recover it to be discontinued.

The commissioners of Washington county, however, at whose

instance the action was brought, insisted that the money was due to the county by contract, and that it was not in the power of the State to release it, and upon that ground continued to prosecute the suit; and, the court of appeals of the State having decided against the claim, the case is brought here by writ of error.

Undoubtedly, if the money was due to Washington county by contract, the act of 1840, which altogether takes away the remedy, would be inoperative and void. But, even if the provisions upon this subject in the act of 1835 could be regarded as a contract with the railroad company, it would be difficult to maintain that the county was a party to the agreement, or that it acquired any private or separate interest under it, distinct from that of the State. It was certainly at that time the policy of the State to require the road to pass through the places mentioned in the law, and, if it failed to do so, to appropriate the forfeiture to the use of the county. But it cannot be presumed that, in making this appropriation, the legislature was governed merely by a desire to advance the interest of a single county without any reference to the interests of the rest of the State. On the contrary, the whole scope of the law shows that it was legislating for state purposes, making large appropriations for improvements in different places; and if the policy which at that time induced it to prescribe a particular course for the road, and, in case it was not followed, to exact from the company \$1,000,000, and devote it to the use of Washington county, was afterwards discovered to be a mistaken one, and likely to prove highly injurious to the rest of the State, it had unquestionably the power to change its policy, and allow the company to pursue a different course, and to release * it from its obligations both as to the direction of the [*550] road and the payment of the money. For, in doing this, it was dealing altogether with matters of public concern, and interfered with no private right; for neither the commissioners, nor the county, nor any one of its citizens, had acquired any separate or private interest which could be maintained in a court of justice.

As relates to the commissioners, they are not named in the law, nor were they in any shape parties to the contract supposed to have been made, nor is the money declared to be for their use. They are a corporate body, it is true, and the members who compose it are chosen by the people of the county. But, like similar corporations in every other county in the State, it is created for the purposes of government, and clothed with certain defined and limited powers to enable it to perform those public duties which, according to the laws and usages of the State, are always intrusted to local county tribunals. Formerly, they were appointed in all of the counties annually

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by the executive department of the government, and were then denominated the levy court of the county; and in some of the counties they are still constituted in that manner, the legislature commonly retaining the old mode of appointment, or directing an election by the people, as the citizens of any particular county may prefer. But, however chosen, their powers and duties depend upon the will of the legislature, and are modified and changed, and the manner of their appointment regulated at the pleasure of the State. And if this money had been received from the railroad company, the commissioners, in their corporate capacity, would not have been entitled to it, and could neither have received nor disbursed it, nor have directed the uses to which it should be applied, unless the State had seen fit to enlarge their powers and commit the money to their care. If it was applied to the use of the county, it did not by any means follow that it was to pass through their hands, and the mode of application would have depended altogether upon the will of the State. This corporation, therefore, certainly had no private corporate interest in the money, and indeed the suit is not entered for their use, but for the use of the county. The claim for the county is equally untenable with that of the commissioners. The several counties are nothing more than certain portions of territory into which the State is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides. And in passing the law of 1835, the people of Washington county did not, and could not, act as a community having separate and distinct interests of their own, but as a portion of the sovereignty; their delegates to the general assembly acting in conjunction with the delegates from every other part of the State, and legislating for public and state purposes, and the validity of the law did not depend upon their assent to its provisions, as it would have [* 551] been equally obligatory upon them, if * every one of their delegates had voted against it, provided it was passed by a constitutional majority of the general assembly. And whether the money was due by contract or otherwise, it must, if received and applied to the use of the county, have yet been received and applied by the State to public purposes in the county; for the county has no separate and corporate organization by which it could receive the money, or designate agents to receive it, or give an acquittance to the railroad company, or determine upon the uses to which it should be appropriated. We have already seen that the corporation of commissioners of the county had no such power; and certainly no citizen of the county had any private and individual property in it. It must have rested with the State so to dispose of it as to promote

the general interest of the whole community, by the advantages it bestowed upon this particular portion of it.

Indeed, if this money is to be considered as due, either to the commissioners or to the county, by contract with the railroad company, so that it may be recovered in this suit, in opposition to the will and policy of the State, it would follow necessarily that it might have been released by the party entitled, even if the State had desired to enforce it. And if the State had adhered to the policy of the act in question, and supposed it to be for the public interest to insist that the road should pass along the line prescribed in that law, or the company be compelled to pay the million of dollars, according to the construction now contended for, the commissioners or the county might have counteracted the wishes of the State, and, by releasing the company from the obligation to pay this money, allowed them to locate the road upon any other line. And if the construction of the plaintiff in error be right, the legislature of Maryland, in a case where the whole people of the State had become so deeply concerned by the large amount subscribed to the capital stock of the road, that its success or failure must seriously affect the interests of every part of the State, and where the improvement was regarded as of the highest importance to its general commercial prosperity, it deliberately deprived itself of the power of exercising any future control over it, and left it to a single county or county corporation to decide upon the course of the road, and either to insist on the line prescribed by the legislature, or to release the company from the obligation to pursue it, without regard to the wishes or interest of the rest of the State. Whether the million of dollars was reserved by contract, or inflicted as a penalty, such a construction of the law cannot be maintained.

But we think it very clear that this was a penalty, to be inflicted if the railroad company did not follow the line pointed out in the law. It is true that the act of 1835, which changed in some important particulars the obligations imposed by the original charter, would not have been binding on the company without its consent; and the 1st section, therefore, contains a provision requiring the *consent of the company in order to give it validity. [* 552] And when the company assented to the proposed alterations in their charter, and agreed to accept the law, it undoubtedly became a contract between it and the State; but it was a contract in no other sense than every charter, whether original or supplementary, is a contract, where rights of private property are acquired under it. Yet, although this supplementary charter was a contract in this sense of the term, it does not by any means follow that the legisla-

ture might not, in the charter, impose duties and obligations upon the company, and inflict penalties and forfeitures as a punishment for its disobedience, which might be enforced against it in the form of criminal proceedings, and as the punishment of an offence against the law. Such penal provisions are to be found in many charters, and we are not aware of any case in which they have been held to be mere matters of contract. And in the case before the court, the language of the law requiring the company to locate the road so as to pass through the places therein mentioned, is certainly not the language of contract, but is evidently mandatory, and in the exercise of legislative power; and it is made the duty of the company, in case they assent to the provisions of that law, to pass through Cumberland, Hagerstown, and Boonsborough; and if they fail to do so, the fine of \$1,000,000 is imposed as a punishment for the offence. And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question.

In this aspect of the case, and upon this construction of the act of assembly, we do not understand that the right of the State to release it, is disputed. Certainly, the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty, is of itself a remission. 1 Cranch, 104; 5 Cranch, 281; 6 Cranch, 203, 329. And in the case of the United States v. Morris, 10 Wheat. 287, this court held, that congress had clearly the power to authorize the secretary of the treasury to remit any penalty or forfeiture incurred by the breach of the revenue laws, either before or after judgment; and if remitted before the money was actually paid, it embraced the shares given by law in such cases to the officers of the customs, as well as the share of the United States. The right to remit a penalty like this, stands upon the same principles.

[* 553] * We are, therefore, of opinion that the law of 1840 hereinbefore mentioned, did not impair the obligation of a contract, and that the judgment of the court of appeals of Maryland must be affirmed.

JAMES STIMPSON, Plaintiff in Error, v. WEST CHESTER RAILROAD
COMPANY.

3 H. 553.

A *certiorari* will not be issued upon a suggestion that parts of the charge of the court below, not appearing by the bill of exceptions to have been excepted to, are not in the record.

MOTION for *certiorari*, by J. R. Ingersoll.

TANEY, C. J., delivered the following opinion of the court.

The plaintiff in error, in this case, suggests that there is diminution in the record, in omitting the charge to the jury, which was delivered at the trial by the circuit court, and moves for a *certiorari*, that it may be set out at length, and appended to the record.

So much of the charge of the court as was excepted to at the trial, is inserted in the record as it now stands; and by the thirty-eighth rule of this court, adopted at January term, 1832, it was ordered that thereafter "the judges of the circuit and district courts do not allow any bill of exceptions, which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters in law, in such charge, to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."

The record now before us contains as much of the charge as is authorized by this rule to be inserted in the exception, and the motion for a *certiorari* must therefore be overruled.

The motion was afterwards renewed, as stated in the opinion of the court.

* TANEY, C. J., delivered the opinion of the court. [* 555]

A motion was made, at a former day of the present term, for a *certiorari*, to bring up the charge delivered by the circuit court at the trial, to be set out at length, and appended to the record. This motion was overruled for the reason then stated by the court.

The motion has since been revived, and a copy of what purports to have been the charge of the court at length has been produced, in order to show that a material point in it has not been inserted in the * exception, as brought up in the record; and [* 556] some memorandums, in the handwriting of the late presiding judge of the circuit court, have also been laid before this court, for the purpose of showing that an exception was reserved to the part of the charge above referred to

United States v. Freeman. 3 H.

In relation to the exception stated in the record, the court think it proper to say, that it contains a great deal of argument which is altogether out of place in an exception, and contrary to the directions of this court as given in the thirty-eighth rule. And it would appear, from the copy of the charge produced in support of this motion, that, while much of the argument of the circuit court has been improperly inserted, the matter of law, which the argument was intended to prove, and upon which the jury were instructed, is omitted. But this court has not the power to correct any errors or omissions that may have been made in the circuit court in framing the exception; nor can we regard any part of the charge as the subject-matter of revision here, unless the judges, or one of them, certify, under his seal, that it was excepted to at the trial. If the portion of the charge in relation to which the diminution is suggested, was in fact embraced in the exception, and the omission of it is a clerical error, then, upon producing here a copy of the exception properly certified, the plaintiff in error will be entitled to a *certiorari*, in order to supply the defect. But we can in no respect alter or amend the exception certified under the seals of the judges of the circuit court, either by referring to the charge at length, or the notes of the presiding judge; and, as the case is now presented, the motion must be refused.

11 H. 154.

THE UNITED STATES, Plaintiffs, v. WILLIAM H. FREEMAN.

3 H. 556.

A brevet field-officer of the marine corps is upon the same footing, in respect to what constitutes his title to pay and emoluments, as a brevet field-officer of infantry of the same grade.

The provision of the 1st section of the act of April 16, 1818, (3 Stats. at Large, 427,) respecting brevet pay and rations, is not repealed by the act of June 30, 1834, (4 Stats. at Large, 712.)

The 5th section of the act of June 30, 1834, (4 Stats. at Large, 713,) does repeal the joint resolution of the two houses of congress, of May 25, 1832, respecting the pay and emoluments of the marine corps.

Under what circumstances a marine officer is entitled to double rations.

CERTIFICATE of division of opinion by the judges of the circuit court of the United States for the district of Massachusetts, upon the following questions.

[* 557] * "1. Whether a brevet field-officer of the marine corps is by law entitled to receive the pay and rations of his brevet rank by reason of his commanding a separate post or station, although the force under his command should not be such as would by law, or by such regulations as have in this respect and for the time

the force of law, entitle a brevet field-officer of infantry of a similar grade to brevet pay and rations ?

"2. Whether the provision respecting brevet pay and rations, in the 1st section of the act of 1818, c. 117, is repealed by the act of 1834, c. 132 ?

"3. Whether, by force of the act of 1834, c. 132, the joint resolution of the two houses of congress of the 25th of May, 1832,¹ respecting the pay and emoluments of the marine corps, is repealed ?

"4. Whether, by force of the army regulation, numbered 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field-officer of marines, commanding a separate post or station, is entitled to double rations ?

"5. Whether the additional fact of appropriations having been made by congress for such double rations, entitles such marine officer to receive the same for the years for which such appropriations are made ?

"6. Whether a brevet field-officer of the marine corps, commanding a separate post, and receiving his brevet pay and emoluments, but being a captain in the line, is entitled to the ten dollars

* a month additional compensation for responsibility of [* 558] clothing, &c., under the act of 1834, c. 132, applying to the marine corps the act of 1827, c. 199 ?" ²

Nelson, (attorney-general,) for the United States.

Freeman, *pro se*, in a printed argument.

* WAYNE, J., delivered the opinion of the court. [* 563]

Several questions occurred upon the trial of this cause in the court below, upon which the opinions of the judges were opposed, and they were certified to this court for decision.

From a careful examination of all the acts of congress relating to the pay and emoluments of brevet officers, and those acts establishing and organizing the marine corps, we are of the opinion, whatever may have been a different practice, that the brevet officers of the marine corps have always been by law upon the same footing with other officers of the military establishment of the United States, in respect to the circumstances which entitle them to pay and emoluments, and that they continue to be so. Brevet pay and emoluments were originally given by the act of 1812,³ (2 Story's Laws, 1278,) and by the act of 1814, (2 Story's Laws, 1414,) ⁴ when breveted officers commanded separate posts, districts, stations, or detachments.

¹ 4 Stats. at Large, 605.

² *Ib.* 227.

³ 2 *Ib.* 784.

⁴ 3 *Ib.* 124.

But an act was passed in 1818, (3 Story's Laws, 1672,) regulating the pay and emoluments of brevet officers, the 1st section of which is, that "the officers of the army who have brevet commissions, shall be entitled to, and shall receive the pay and emoluments of their brevet rank, when on duty and having a command according to their brevet rank, and at no other time." The 2d section is, "that no brevet commission shall hereafter be conferred, but by and with the advice of the senate." By the acts of 1812 and 1814, they were conferred by the President alone. By the 1st section of the act of 1818, it will be perceived that pay and emoluments were attached to command, and not, as they had been, to the command of separate posts, stations, districts, or detachments. That the act of 1818 repealed the 4th section of the act of 1812, no one doubts. But it is said, it is not a repeal of the 3d section of the act of 1814, because the act, in terms, speaks of the officers of the army who have brevet commissions, and not of such officers of the marine corps. It may be well to state that the 3d section of the act of 1814 is a transcript of the 4th section of the act of 1812, except that it has in it the words,

"officers of the marine corps," instead of "officers of the [* 564] army;" and that the * words, "stations or detachments,"

were substituted for "posts, districts, or detachments." The first point for consideration is, was the act of 1818 a repeal of the 4th section of the act of 1812, and of the 3d section of the act of 1814, as to the condition upon which brevet officers were to have additional pay and emoluments? It is conceded that it repealed the 4th section in the act of 1812. We are of opinion that it repealed also the 3d section of the act of 1814. It cannot be denied that the marine corps is an addition to the "military establishment of the United States." It is declared to be so in the act by which it was organized. Now, though neither that fact, nor the words "military establishment," as they are used in the acts of congress, will of themselves authorize the inclusion of officers of the marine corps, within the words "officers of the army," yet, considering the subject-matter of the act of 1818, the application of the 2d section of the act to all breveted officers, and the assimilation of the marine corps, by the act of 1814, to the army, to give to its officers brevet commissions, and pay exactly, too, in the same way as they were given to the officers of the army, by the act of 1812, we do not see how, consistently with a correct judicial interpretation, the conclusion can be resisted, that congress did intend, in passing the act of 1818, to place the officers of the marine corps and the officers of the army upon the same footing, in respect to brevet pay and emoluments. Though what has been differently done is binding upon the government, and cannot be re-

called, to the pecuniary disadvantage of any officer, who may have received brevet pay and emoluments, not according to the act of 1818, no erroneous practice under it, of however long standing, can justify the allowance of a claim, contested by the government in a suit contrary to what is the true meaning and intent of that act. The error of the accounting officers of the treasury, and of the officers of the marine corps, in the construction of the act of 1818, arose from that act having been considered by itself, without any reference to other statutes relating to brevet commissions and pay, and without any examination whether the words "officers of the army," as used in the 1st section of the act of 1818, though they are descriptive of a particular class, were not intended, from their connection with the subject-matter of the act, to comprehend all officers of the military establishment of the United States, who, when the act was passed, were only under like circumstances entitled to brevet pay and emoluments.

The correct rule of interpretation is, that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts, *in pari materia*, are to be taken together as if they were one law. Doug. 30; 2 Term Rep. 387, 586; 4 M. & Selw. 210. If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym. 1028; and if it can be gathered from a *subsequent statute *in pari materia*, what meaning the [* 565] legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Morris v. Mellin*, 6 Barn. & Cress. 454; 7 Barn. & Cress. 99. Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words. *Wimbish v. Tailbois*, Plowd. 57. A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter. *Stowell v. Zouch*, Plowd. 366. These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed — the limitation of the rule being that, to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason. This court has repeatedly, in effect, acted upon the rule; and there may be found, in the reports of its decisions, cases

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under it like the cases which have been cited from the reports of the English courts. In 4 Dall. 14: "The intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." In 2 Cranch, 33: "A law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature," &c. &c. In the case of the United States v. Fisher *et al.*, assignees of Blight, in the same book, p. 386, the court said: "It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole," &c. In 2 Pet. 662: "A legislative act is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature." In Paine's C. C. Rep. 11: "In doubtful cases, a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the legislature." So in 1 Brockenb. C. C. Rep. 162. In the construction of statutes, one part must be construed by another. In order to test the legislative intention, the whole statute must be inspected. No one of the cases cited will justify; nor have they been cited to sanction an equitable construction of statutes beyond the just application of adjudicated cases. They have been brought together upon this occasion for the purpose of showing how many authorities there are to sustain the conclusion that the act of 1818, regulating the pay and emoluments of brevet officers, repealed the act of 1814, upon which the defendant relies to support his [* 566] claim to brevet pay. Our answer to the first question, * then, is, that a brevet field-officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field-officer of infantry, of a similar grade, to brevet pay and rations. We will add to our exposition of the law upon this point, that brevet officers of the marine corps, in respect to pay and emoluments, were included under the Army Regulation, 1124, sanctioned on the 1st March, 1825; were included, also, in the regulation upon the subject of brevet pay, sanctioned by the President, December 1, 1836, and that they may claim brevet pay and emoluments under the regulations of 1841, when they exercise a command, according to the provisions regulating brevet pay, in page 344, Army Regulations of 1841. This right to brevet pay results from the marine corps having been subjected, by the act of 1798,¹ (1 Story's

¹ 1 Stats. at Large, 594.

Laws, 542,) and by other acts of congress, to the same rules and articles of war "as are prescribed for the military establishment of the United States," and from the exception in the 2d section of the act of 30th June, 1834, taking them out of the regulations which might be established for the navy, when detached for service with the army, by order of the President of the United States.

To the second question we reply, that the act of 1834, c. 132, does not repeal the 1st section of the act of 1818, regulating the pay and emoluments of brevet officers. That section of the act is still in force, and upon it rests the army regulations, in relation to brevet pay and emoluments. The act of 1834 only repeals those sections in the acts of 1812 and 1814, and in the act of 1818, by which the President was authorized to confer, and the senate was permitted to confirm, brevet commissions conferred upon officers of the army, or officers of the marine corps, for ten years' service in any one grade, excepting such officers as had, before the passage of the act, acquired the right to have brevet rank conferred by ten years' service in any one grade, if the President should think fit to nominate them to the senate for brevet commissions.

To the third question we reply, that the 5th section of the act of the 30th June, 1834, is a repeal of the joint resolution of the two houses of congress of the 25th May, 1832, respecting the pay and emoluments of the marine corps.

The fourth question involves the charge made by the defendant for double rations. Additional rations are provided for by the 5th section of the act of 1802,¹ 2 Story's Laws, 831. "To the commanding officer of each separate post, such additional number of rations as the President of the United States shall, from time to time direct, having respect to the special circumstances of each post," is the language of a part of the section. It is the authority for the 1125th paragraph in the Army Regulations of 1825. "The President sanctioned those regulations, and by doing so, delegated his authority, * as he had a right to do, to the secretary at war. [* 567] The army regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law. The regulations of 1825, then, were as conclusive upon the accounting officer of the treasury, whilst they continued in force, as those of 1836 afterwards were, and as those of 1841 now are. When, then, an officer presents, with his account, an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the war department, in conformity with

¹ 2 Stats. at Large, 132.

the provisions of the army regulations, allowing double rations, his right to them is established, nor can they be withheld, without doing him a wrong, for which the law gives him a remedy. But as the question in this case must be decided upon the agreed statement of facts in the record, between Colonel Freeman and the district attorney of the United States, we have no hesitation in answering it adversely from the claim of the defendant, for double rations, as the fact does not appear in the record, that he had such a command of a post or arsenal, at which double rations had been allowed, according to the army regulations which were in force, from the time his account begins, or according to those subsequently sanctioned by the President. To the fifth question, we reply, that the fact of appropriations having been made by congress for double rations, does not determine what officers in command are entitled to them. The sixth question relates to the charge of the defendant for "compensation for his duties and responsibilities, with respect to clothing, arms and accoutrements," while he was a captain in the line of the marine corps, and in command of the marines on the Boston station. The question, as it is put, makes it necessary for us to repeat what has been already said in a previous part of this opinion, that a brevet field-officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in command of a post or not, he is entitled to the compensation given by the 2d section of the act of the 2d March, 1827, 3 Story's Laws, 2057. We cannot give any other answer to this question, because the first part of it attaches brevet pay and emoluments to the command of a separate post, for which it is not allowed by law, and cannot therefore influence any right to compensation which may have accrued to a captain in the line under the 2d section of the act of the 2d March, 1827. That act is in full force, unrepealed in any way by the act of 1834, for the better organization of the marine corps. 4 Story, 2383. And captains and subalterns of that corps are as much entitled to its provisions, as any other captains or subalterns in the military establishment of the United States. If there was any doubt of this, before the act of 1834 was passed, the 5th [* 568] section of that act must be considered * as having put an end to it. It is, "that the officers of the marine corps shall be entitled to, and receive the same pay, emoluments, and allowances, as are now, or may hereafter be allowed to similiar grades in the infantry of the army," subject to the exception in the section following the words just cited.

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We shall direct the foregoing answers to the questions, upon which the judges in the court below were opposed in opinion, to be certified to that court.

1 B. 55.

JAMES B. ANDREWS, Appellant, v. WILLIAM H. WALL and JOHN H. GEIGER, Defendants.

3 H. 568.

An agreement of consortship, made by the masters of two vessels employed in the business of salvage, must be deemed to be made by the masters in behalf of the owners and crew as well as themselves, and, in the absence of a stipulation to that effect is not dissolved by a change of one of the masters.

The answer to a libel is not evidence of a stipulation to that effect.

The admiralty has jurisdiction over such a contract of consortship, as a maritime contract.

It belongs to the jurisdiction of the admiralty to entertain suits to try the title to proceeds in the registry of the court.

THE case is stated in the opinion of the court.

Coxe, for the appellant.

C. J. Ingersoll, contra.

* STORY, J., delivered the opinion of the court. [* 571]

This is the case of an appeal in admiralty, from a decree of the court of appeals of the territory of Florida, affirming the decree of the judge of the superior court of the southern judicial district of Florida. It appears from the proceedings, that upon a libel filed in the superior court of the territory, in behalf of the owners and crew of the sloop *Globe*, salvage had been awarded in their favor, against the ship *Mississippi*; that a part of the salvage so decreed remained in the registry of the court; and that the present petition was filed by Wall and Geiger, on behalf of the owners of the schooner *George Washington*, for the share of the salvage due to them, as consorting with *The Globe* in the business of salvage. It seems to be a not uncommon course among the owners of a certain class of vessels, commonly called wreckers, on the Florida coast, with a view to prevent mischievous competitions and collisions in the performance of salvage services on that coast, to enter into stipulations with each other, that the vessels owned by them respectively shall act as consorts with each other in salvage services, and share mutually with each other in the moneys awarded as salvage, whether earned by one vessel or by both. It is admitted in the answer of the appellant, who was the master and part owner of *The Globe*, and the original respondent in the court below, that such an agreement or stipulation was entered into, for an indefinite time, between himself, as the master of *The Globe*, and the master of *The George*

Washington, before the salvage service in question; but he insists that it was to remain in force only so long as both remained masters of their respective vessels, and earned salvage; and that [* 572] at the time of the salvage services in question, one Thomas Greene, mate of *The Globe*, acted as master thereof. He also insists, that the libellants have no right to come into the court, in a summary way, to obtain a share of the salvage; and lastly, he insists that the agreement or stipulation was not made between him and the libellants.

The courts below overruled all these matters of defence; and upon the present appeal the same are brought before us for consideration and decision. In the first place, then, as to the original agreement or stipulation for consortship, it must, although made by the masters of the vessels, be deemed to be made on behalf of the owners and crews, and to be obligatory on both sides, until formally dissolved by the owners. The mere change of the masters would not dissolve it, since in its nature it is not a contract for the personal benefit of themselves, or for any peculiar personal services. It falls precisely within the same rule, as to its obligatory force, as the contract of the master of a ship for seamen's wages, or for a charter-party for the voyage, which, if within the scope of his authority, binds the owner, and is not dissolved by the death or removal of the master. Besides, in the present case, the agreement or stipulation for consortship was for an indefinite period, and, consequently, could be broken up or dissolved only upon due notice to the adverse party; and the mere removal of the master of one of the vessels, by the owner thereof, for his own benefit or at his own option, could in no manner operate, without such notice, to the injury of the other. In the next place, there is not a particle of evidence in the case, that, at the time of the agreement or stipulation for consortship, it was agreed between the parties, that a change of the masters should be treated as a dissolution thereof. The answer is not of itself evidence to establish such a fact, but it must be made out by due and suitable proofs; for in the admiralty the same rule does not prevail as in equity, that the answer to matters directly responsive to the allegations of the bill, is to be treated as sufficient proof of the facts, in favor of the respondent, unless overcome by the testimony of two witnesses, or of one witness and other circumstances of equivalent force. The answer may be evidence, but it is not conclusive; and in the present case, the dissolution of the agreement or stipulation for consortship, by the change of the master of *The Globe*, seems to be relied on as a mere matter of law, and not as a positive ingredient in the original contract.

The material and important question, therefore is, whether the agreement or stipulation of consortship is a contract capable of being enforced in the admiralty against property or proceeds in the custody of the court? We are of opinion that it is a case within the jurisdiction of the court. It is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. Over maritime contracts the admiralty possesses a clear and *established jurisdiction, capable of being enforced [* 573 *in personam*, as well as *in rem*; as is familiarly seen in cases of mariners' wages, bottomry bonds, pilotage services, supplies by material-men to foreign ships, and other cases of a kindred nature, which it is not necessary here to enumerate. The case of *Ramsay v. Allegre*, 12 Wheat. 611, contains no doctrine, sanctioned by the court, to the contrary. It is within my own personal knowledge, having been present at the decision thereof, that all the judges of the court, except one, at that time concurred in the opinion that the case was one of a maritime nature, within the jurisdiction of the admiralty, but that the claim was extinguished by a promissory note having been given for the amount, which note was still outstanding and unsurrendered. It became, therefore, unnecessary to decide the other point. The general doctrine had been previously asserted in the case of *The General Smith*, 4 Wheat. 438, and it was subsequently fully recognized and acted upon by this court, in *Peroux v. Howard*, 7 Pet. 324. Upon general principles, therefore, there would be no difficulty in maintaining the present suit, as well founded in the jurisdiction of the admiralty.

There is another view of the matter, which does not displace but adds great weight to the preceding considerations. This is a case of proceeds rightfully in the possession and custody of the admiralty; and it would seem to be, and we are of opinion that it is, an inherent incident to the jurisdiction of that court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof. This is familiarly known and exercised in cases of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material-men, where, after satisfaction thereof, there remain what are technically called "remnants and surplusses," in the registry of the admiralty. But a more striking example is that of supplemental libels and petitions, by persons asserting themselves to be joint captors, and entitled to share in prize proceeds, and of custom-house officers, for their distributive shares of the proceeds of property seized and condemned for breaches of the revenue laws, where the juris-

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diction is habitually acted upon in all cases of difficulty or controversy.

Upon the whole, without going more at large into the subject, we are of opinion, that the decree of the court of appeals of Florida ought to be affirmed, with costs.

5 H. 441; 19 H. 22; 1 B. 522.

AUGUSTUS and EDWARD BONNAFEE, Partners, under the Name and Style of BONNAFEE AND COMPANY, Plaintiffs in Error, v. IRA E. WILLIAMS, CHARLES S. SPANN, and B. H. COOK, Defendants in Error.

3 H. 574.

A citizen of one State having the legal title, may sue a citizen of another State, in a circuit court, without reference to the citizenship of the plaintiffs *cestuis que trust*.

An action at law by the bearer will lie on a note payable to A B or bearer for the use of an unincorporated company, of which the promisors are members.

THE case is stated in the opinion of the court. It should be added that the banking company mentioned was not incorporated.

Walker, for the plaintiffs.

No counsel *contra*.

[* 577] * M'LEAN, J., delivered the opinion of the court.

This is a writ of error from the southern district of Mississippi.

The plaintiffs brought their action on four promissory notes, payable at different times, for different sums, and bearing different dates, except two, which were dated the 23d January, 1839. In each of the notes the defendants promised, or either of them, to pay to Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds County, at their banking-house in Clinton, the sum named, without defalcation, for value received.

The defendants demurred to the declaration, and assigned the following causes of demurrer: —

1. “ The plaintiffs cannot maintain the action, because, by their own showing, the defendants who are sued are also a part of the persons for whose use the suit is commenced.”

2. “ The court can have no jurisdiction of this case, because, although it is true, the nominal plaintiffs are the bearers of the paper sued on, and citizens of a State other than Mississippi, yet, those for whose benefit suit is brought, for any thing which appears in the declaration, are citizens of the State of Mississippi.”

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The notes in question passed by delivery, and the plaintiffs, as bearers, have a right to sue in their own names, as the promise to pay is made to bearer. The plaintiffs allege that they are citizens of New York, and, consequently, the circuit court had jurisdiction of the case. Where the citizenship of the parties give jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue, at law, in the federal courts, without reference to the citizenship of those who may have the equitable interest. *Irvine v. Lowry*, 14 Pet. 298. The judgment of the circuit court, which sustained the demurrer, is reversed; and the cause is remanded for further proceedings.

5 H. 278; 21 H. 575.

THE UNITED STATES, Plaintiffs, v. ELI S. PRESCOTT *et al.* Defendants.

3 H. 578.

It is not a defence to an action on the official bond of a receiver of public moneys, conditioned to keep safely the public moneys collected by him, that the money was feloniously stolen, without any fault on his part.

THE case is stated in the opinion of the court.

Nelson, (attorney-general,) for the United States.

Dickey and *Burke*, contra.

* M'LEAN, J., delivered the opinion of the court. [* 587]

This action was brought in the circuit court for the district of Illinois, on a bond given by Prescott, with the other defendants as his sureties, for his faithful performance of the duties of receiver of public moneys, at Chicago, in the State of Illinois. The defence pleaded was, that the sum not paid over by the defendant, Prescott, and for which the action was brought, had been feloniously stolen, taken, and carried away, from his possession, by some person or persons unknown to him, and without any fault or negligence on his part; and he avers that he used ordinary care and diligence in keeping said money, and preventing it from being stolen.

To this plea, the plaintiffs filed a general demurrer; and on the argument of the demurrer, the opinions of the judges were opposed on the question, whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharged him and his

sureties, and may be set up as a defence to an action on his official bond?" And this point is now before this court, it having been certified to us under the act of congress.

On the part of the defendant it is contended that the defendant, Prescott, was a depositary for hire; and that unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary; that the special contract does not enlarge his liability.

This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are [* 588] founded upon * public policy. The conditions of the bond are, that the said Prescott has "truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge all the duties of said office," (of receiver of public moneys at Chicago,) "according to the laws of the United States; and moreover has well, truly, and faithfully, and shall well, truly, and faithfully, keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and would faithfully and promptly make, the same, as directed," &c.

The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him?

The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defence can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.

The case of *Foster et al. v. The Essex Bank*, 17 Mass. 479, was a mere naked bailment, and of course does not apply in principle

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to this case. The deposit in that case was for the accommodation of the depositor, and without any advantage to the bank, as the court say, "which can tend to increase its liability. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents."

Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public * moneys, and others who receive more or less of the [* 589] public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defence. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.

The question certified to us is answered, that the defendant, Prescott, and his sureties, are not discharged from the bond, by a felonious stealing of the money, without any fault or negligence on the part of the depositary; and consequently, that no such defence to the bond can be made.

11 H. 154; 4 Wal. 182.

BERNARD PERMOLI, Plaintiff in Error, v. MUNICIPALITY No. 1 OF THE CITY OF NEW ORLEANS, Defendant in Error.

3 H. 589.

Though by the act of February 20, 1811, (2 Stats. at Large, 641,) certain restrictions were imposed on the convention which was to form the constitution of Louisiana, in respect to what that constitution should contain, yet when by the act of April 8, 1812, (2 Stats. at Large, 701,) Louisiana was admitted into the Union, "on an equal footing with the original States," congress must be considered to have been satisfied those restrictions had been observed, in forming the constitution, and it is no longer a question under any law of the United States, whether an individual has been injured by a violation of a right intended to be secured by those restrictions.

The act of March 2, 1805, (2 Stats. at Large, 322,) granted to the inhabitants of the territory

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of Orleans, the rights secured to the people of the Northwestern Territory by the ordinance of 1787, so far as the same had been conferred on the people of the Mississippi territory; but the political right to religious liberty, provided for in that ordinance and in this act of congress, ceased to depend thereon, when the State was admitted to the Union. If it existed, it was under the constitution of the State alone.

ERROR to the city court of New Orleans, in a proceeding to recover a penalty for breach of an ordinance of the First Municipality of the city of New Orleans, that court being the highest court of the State to which the question could be carried. The ordinance imposed a penalty on any priest who should officiate at any funeral, in any church other than the "obituary chapel." The plaintiff in error was a Roman Catholic priest, and on being proceeded against filed an answer which was as follows:—

"The answer of the Reverend B. Permoli, residing at New Orleans, to the complaint of Municipality No. 1.

"This respondent, for answer, says, true it is that the corpse of Mr. Louis Le Roy, deceased, was brought (inclosed in a coffin) in the Roman Catholic church of St. Augustin, and there exposed; and that when there thus exposed, this respondent, as stated in the complaint, officiated on it, by blessing it, by reciting on it all the other funeral prayers and solemnity, all the usual funeral ceremonies prescribed by the rites of the Roman Catholic religion, of which this respondent is a priest. That in this act he was assisted by two other priests, and by the chanters or singers of the said church.

"This respondent avers, that in so doing he was warranted by the constitution and laws of the United States, which prevent the enactment of any law prohibiting the free exercise of any religion. He contends that the ordinance on which the complainants rely is null and void, being contrary to the provisions of the act of incorporation of the city of New Orleans, and to those of the constitution and laws of the United States, as above recited.

"This respondent therefore prays to be hence dismissed with costs.

Signed,

D. SEGHERS, of counsel."

The judge of the first instance held the ordinance illegal, but on appeal to the city court, judgment was given against the defendant.

Read and Coxe, for the plaintiff

Barton, contra.

[*609] * CATRON, J., delivered the opinion of the court.

As this case comes here on a writ of error to bring up the proceedings of a state court, before proceeding to examine the merits

of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.

The ordinances complained of, must violate the constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power by the 25th section of the judiciary act,¹ to interfere. The constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the States. We must therefore look beyond the constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following acts of congress. That of February 20, 1811, authorized the people of the territory of Orleans to form a constitution and state government; by section 3, certain restrictions were imposed in the form of instructions to the convention that might frame the constitution; such as that it should be republican; consistent with the constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of *habeas corpus*; that the laws of the State should be published, and legislative and judicial proceedings be written and recorded in the language of the constitution of the United States. Then follows by a second proviso, a stipulation reserving to the United States the property in the public lands, and their exemption from state taxation — with a declaration that the navigation of the Mississippi and its waters shall be common highways, &c.

By the act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the act of 1811; congress declared it should be on the conditions and terms contained in the 3d section of that act; which should be considered, deemed, and taken, as fundamental conditions and terms upon which the State was incorporated in the Union.

All congress intended was, to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution, and admitted the State, "on an equal footing with the original States in all respects whatever," in express

¹ 1 Stats. at Large, 85.

terms, by the act of 1812, congress was concluded from [* 610] assuming *that the instructions contained in the act of 1811, had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution ; if congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812, could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation ; and in our opinion were not otherwise intended.

The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787. The act of 1805, c. 83, having provided, that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges, and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

In the ordinance, there are terms of compact declared to be thereby established, between the original States, and the people in the States afterwards to be formed northwest of the Ohio, unalterable, unless by common consent—one of which stipulations is, that “no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.” For this provision is claimed the sanction of an unalterable law of congress ; and it is insisted the city ordinances above have violated it ; what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the State of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of congress were all superseded by the state constitution ; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the State. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787, and an act of the legislature of Louisiana, or a city regulation founded on such act ; and therefore this court has no

 Chaires v. United States. 3 H.

jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old States and the new ones; and that the writ of error must be dismissed.

10 H. 82; 19 H. 898; 4 Wal. 838.

JOSEPH CHAIRES, Executor of BENJAMIN CHAIRES, deceased, and
PETER MIRANDA and GAD HUMPHREYS, Appellants, v. THE UNITED
STATES.

3 H. 611.

This court having made a decree, affirming a decree of the court below for a specific tract of land, ascertained by a survey made under the order of the court below, under the act of 1824, (4 Stats. at Large, 52,) applied to Florida titles by the act of May 23, 1828, § 6, (4 Stats. at Large, 285,) the latter court could not, on petition, correct any alleged mistake in that survey.

APPEAL from a decree of the superior court of East Florida, dismissing a petition for a rehearing, to correct an alleged mistake in a survey made under an order of that court in a proceeding to confirm a Spanish title. This proceeding came before this court, and is reported, 10 Pet. 308. The residue of the facts appear in the opinion of the court.

Berrien, for the appellants.

Nelson, contra.

* CATRON, J., delivered the opinion of the court. [*618]

On the facts presented, one consideration is whether the petition was dismissed for a proper reason. The petition was moved on by the claimant's counsel — and resisted on the ground that it had not been filed within the time allowed by law and the rules of the court, and it is insisted it was dismissed for this reason, which is insufficient; as the bar of five years cannot be interposed under the circumstances. If this had been the reason given, it would be immaterial, if the order was proper for other reasons. The 32d section of the judiciary act,¹ prescribes the duty of this court in such cases and directs it to proceed and give judgment according to the right of the cause, and matter in law, without regard to any imperfections in the judgment.

But we do not apprehend any imperfection to exist; the court says: "It is considered that a petition for a rehearing cannot now be

¹ 1 Stats. at Large, 91.

entertained by this court, in this cause." And why not? In 1829, a proceeding was instituted in the superior court of East Florida by the claimants for the confirmation of a claim for 20,000 acres of land granted to Arredondo. In 1830, that court declared the title valid, on the face of the title-papers; this fact existing, the next presented for ascertainment was the sufficiency of the description as to the general locality of the land granted. But the duties of the [* 619] * court did not end here; by the 2d section of the act of 1824, it was not only given full power and authority to hear and determine all questions arising in the cause relative to the validity of the title, and the descriptive identity of location on the face of the title; but thirdly to settle the precise boundaries of the land on the ground; founding its decree on an existing survey, if a proper one was produced, and if not, to let the party proceed according to the 6th section of the act. On the face of the title no material difficulty seems to have arisen; but to identify the land called for was most difficult, and probably impossible. If the grant had been unaided by a survey, it cannot well be perceived how it could have escaped from the principles on which were rejected the claims of Forbes, Buyck, and Joseph Delespine, (found in 15 Pet. 173, 215, 319,) and of Miranda, (in 16 Pet. 153.) To avoid doing so, the land was decreed by metes and line-marks, founded on a survey (purporting to have been made for the land granted) by Don Andres Burgevin, on the 14th of September, 1819.

This survey, it is contended, is for land lying in a different locality from that referred to in the grant, and being so, it is urged, that according to the rulings of this court, no survey could be made for any other land than that granted after the 24th of January, 1818; as this would in effect be a new grant, which the treaty prohibited after that date, according to the cases of Clarke and Huertas, in 8 and 9 Pet. 171, 436, and that of Forbes, 15 Pet. 182; and there being no equivalent provided in the grant to except the case from these principles, the survey could not legally be the basis of a decree.

This may have been true, and the decree for the land contained in Burgevin's survey erroneous; but the question is, whether the court below had any power to correct it? If it had not, then no petition for such purpose could be heard, either on the part of the United States or the claimants in that court.

From the decree made in 1830, an appeal was prosecuted by the United States to this court; the claimants rested content, and prosecuted no cross appeal. 10 Pet. 308. On a hearing, the decree below was affirmed for the specific land, and the cause remanded for further proceedings, to the end that a patent might issue, pursuant to the 6th

section of the act of 1824, which declares it shall be for the land "specified in the decree;" and prohibits a survey for any other land, unless that decreed has been disposed of, when a change is authorized by the 11th section; but as no other appropriation of the land set forth in the decree is alleged to exist, this circumstance is out of the present case.

The claimants not being willing to take the land in Burgevin's survey, assumed the right to have a resurvey made, or to have adopted that made by Joshua A. Coffee, on their behalf, in 1834, which they allege is at the place called for in the grant; and this on the ground that the decree of 1830 is inconsistent, it being in confirmation of the land granted, and also of Burgevin's survey, * the places not being the same. This change was re- [*620] fused at the land-office here, for the reason that the decree excluded such a change until it was altered by the proper judicial authority. For this purpose the petition for a rehearing was filed, seeking to have the decree of 1830 reformed, and that part of it establishing locality and boundaries set aside or disregarded, and the land located elsewhere. This the superior court of East Florida had no power to do, on the facts set forth by the petition, because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court; and it has no authority to disturb it by the mode proposed, but can only execute our mandate, and settle so much as remains to be done. For the principles governing in like cases, we refer to the *ex parte* application of Sibbald, and the rules there laid down, (12 Pet. 489, 490,) to which nothing need be added; as they are altogether adverse to the present proceeding, and show that the petition was properly dismissed.

THE UNITED STATES, Appellants, v. WILLIAM MARVIN.

3 H. 620.

The courts of Florida had not jurisdiction to receive a petition for the confirmation of a private land claim after May 26, 1831.

THE case is stated in the opinion of the court.

Nelson, (attorney-general,) for the United States.

Marvin, contra.

* CATRON, J., delivered the opinion of the court.

[*622]

This is an appeal from a decree rendered by the superior

court of the district of East Florida, by which it was adjudged that no limitation existed to the filing, for adjudication, a claim for land under the acts of 23d May, 1828,¹ and of 26th of May, 1830.²

[* 623] *The petition to the superior court of Florida was filed in 1843, by Marvin, to have confirmed to him 7,000 acres of land on the River St. John's, by a concession in the first form made in favor of Don Bernardo Segui, on the 20th December, 1815, by Governor Estrado; and the first question presented below was, and is here, had the superior court jurisdiction to entertain the cause? That court having adjudged that the act of 1830 had no limitation in it, and our conclusion being to the contrary, we will briefly state our reasons for reversing the decree and for ordering the petition to be dismissed.

The first act conferring jurisdiction on certain courts of the United States, to adjudge titles to land of the foregoing description, was that of May 26, 1824,³ and applicable to lands lying within the State of Missouri and territory of Arkansas. By the 5th section of that act, it was declared that all claims within its purview should be brought by petition before the district court within two years from the passing of the act; and when so brought before the court, if the claimant, by his own neglect or delay, failed to prosecute the cause to final decision within three years, he should be forever barred both at law and in equity; and that no other action at common law, or proceeding in equity, should ever thereafter be sustained in any court whatever in relation to said claims.

By the act of 1828, § 6, the provisions of the act of 1824 were extended to the superior court of Florida, with some modifications; and, among others, by section 12, that any claims to lands within the purview of that act which should not be brought by petition before the proper court within one year from the passing of the act; or which, being brought before the court, should not, on account of the neglect or delay of the claimant, be prosecuted to a final decision within two years, should be forever barred; and that no action at common law or in equity should ever thereafter be sustained in any court whatever. And by section 13, the decree was to be conclusive between the United States and the claimant.

The act of 1830, in its 1st, 2d, and 3d sections, confirms various claims; and in the 4th section declares, that all the remaining claims which had been presented according to law to certain boards of commissioners referred to in the previous sections, and not finally acted on by congress, should be adjudicated and finally settled upon the

¹ 4 Stats. at Large, 284.

² 4 Ibid. 405.

³ Ibid. 52.

same conditions, restrictions, and limitations, in every respect, "as are prescribed by the act of congress approved May 23, 1828, entitled an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida." The last law of 1830 is also entitled an act to provide for the same purpose. It is supplementary to, and in effect reënacts the law of 1828; carrying with it the entire provisions of the previous statutes, save in so far as previous parts of them were modified by subsequent conflicting provisions. The policy of congress * was to settle the [* 624] claims in as short a time as practicable, so as to enable the government to sell the public lands; which could not be done with propriety until the private claims were ascertained. As these were many in number, and for large quantities, no choice was left to the government by their speedy settlement and severance from the public domain; such has been its anxious policy throughout, as appears from almost every law passed on the subject. In 1828, the time for filing petitions before the courts, was even reduced from two years to one, and a positive bar interposed in case of failure. This policy we think congress intended to maintain, and that the courts of Florida had no jurisdiction to receive a petition for the confirmation of an incomplete concession like the one before us, after the 26th of May, 1831.

Some stress has been placed on the language employed by this court in *Delespine's case*, 15 Pet. 329, and on which it is supposed the court below founded its decree on the head of jurisdiction. There, an amended petition had been filed after the expiration of a year from the 26th of May, 1831, and the question was whether the defective petition, filed in time, had saved the bar, and it was held that it had. But so far from holding that no bar existed, the contrary is rather to be inferred; the direct question was neither decided nor intended to be.

For the reasons stated, we order the decree of the superior court of East Florida to be reversed, and direct that the appellees' petition be dismissed.

LLEWELLYN PRICE, JR., for the Use of DANIEL W. GAULLEY, Plaintiff in Error, v. MARTHA A. SESSIONS.

3 H. 624.

Bequest to a daughter, to be delivered to her when she arrives at the age of eighteen years, but if she should die under that age, leaving no heir of her body, then over; she married at the age of sixteen.

Held, that the husband could take nothing by his marital right till the wife arrived at the age of eighteen.

ERROR to the circuit court of the United States for the southern district of Mississippi. It was an action to try the title to certain slaves, levied on by the plaintiff in error as the property of the husband of the defendant in error, and claimed by her as her separate estate. The residue of the material facts appear in the opinion of the court.

Henderson, for the plaintiff.

Crittenden, contra.

[*633] *CATRON, J., delivered the opinion of the court.

The question arising on the charge of the circuit court is, What interest had the husband, Sessions, in the property in controversy at the time it was levied on for his debts. If he had any subject to execution, it was acquired by the marriage with his wife as owner. Her right depended on the will of her father.

Russell Smith died in 1836, in the State of Mississippi, leaving a last will and testament, duly proved in Warren County, (27th July, 1836,) leaving E. J. Sessions, P. W. Defrance, John Lane, and George Selser, his executors; and also leaving John Lane testamentary guardian to the testator's only child, Martha Ann Smith. Sessions, Lane, and Selser, qualified as executors.

The testator first provided, that his debts should be paid by the proceeds of crops from his plantation, and that the force should be kept together until the crops paid the same, not exceeding two, however.

He next gave to his step-son, William D. Griffin, a section of land, and various slaves, to be delivered to this devisee, when he arrived at the age of twenty-one years. But should he die before, then, and in that event, the property, real and personal, was to be divided between E. J. Sessions, P. W. Defrance, W. Le Defrance, and Charles A. Defrance, provided they should be living; if not, the property to revert to the estate, to be disposed of as thereafter provided.

2. All the remaining balance of the estate, real and personal, is devised to the daughter, Martha Ann Smith; and should all of the devisees mentioned in the first clause be dead before William D. Griffin attained twenty-one years of age, then the whole estate was to be inherited by said Martha Ann. "But at all events (says the

will) the property is to be kept together and the force worked
[*634] on *the plantation until my said daughter Martha Ann arrives at the age of eighteen years; at which time my executors are to deliver over to her all of the property first set apart for

her, and still retain the possession of the legacy to W. D. Griffin, and not deliver it to her if he lives until he is twenty-one years of age." The proceeds of the crops to be vested in young slaves in the mean time.

If the daughter should die before she arrive at the age of eighteen, or had an heir of her body, then the legacy left her, (and that left to Griffin also, if vested in her,) are directed to be disposed of otherwise, in charities, &c.

At about sixteen years of age, Martha Ann married Egbert J. Sessions, one of the executors, who had the principal management of the estate, and possession of the property. For the additional facts, we refer to the statement of the reporter. On this proof the court instructed the jury: "That the property devised and bequeathed by the will of Russell Smith to the claimant, Martha A., did not vest in her, nor was she entitled to the possession of it, until she, the claimant, arrived at the age of eighteen years; and although she married the defendant in the execution before that time, the title of the property could not be vested in him until the claimant attained eighteen years of age, at which time, under the will, she became entitled to the possession of it; that the property in controversy is a *chose in action*, and could not vest in her husband until she or he had reduced it to possession, which could not be done, by the terms of the will, before she was eighteen years of age. If, therefore, when the act of the Mississippi legislature, securing to married women their property, free from the debts of their husbands, (which went into effect in April, 1839,) the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this execution; and if they believe from the evidence, that the possession held by Egbert J. Sessions, one of the defendants in the execution, was held as executor up to that time jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property."

As the legacy was outstanding at the time of the marriage, the title was in the executors, subject, first, to the payment of debts, and then the claim of the devisee; but on the contingency, that until the daughter arrive at eighteen, or had an heir of her body, she should in the mean time take nothing more than a support; and this whether she married or not, for a marriage was contemplated as possible before the age of eighteen, as the becoming a mother before was provided for, so that the child might take through the mother.

We think it is free from doubt that the executors had no power to deliver possession of the property devised to the daughter before either of the contingencies above occurred; and that an attempt to

do so, either to the guardian, or to the husband, would have [*635] been void, because in violation of the manifest intention of the testator. It follows, that until the wife arrived at the age of eighteen, or had an heir of her body, the husband could only hold possession as executor. Had he died before, then we think it clear the wife would have taken, and not the personal representative of the husband, as the executors could not assent in his behalf to the vestiture of the legacy in possession. Provisions in wills, that the executors shall retain the property devised until the devisee is of lawful age, and postponements to later periods, are of common occurrence; the executors having assumed the trust, are held to its execution; on their responsibility and prudence the testator relied, and not on future husbands that young and orphan daughters might marry, nor on guardians selected by indiscreet and incompetent minors. These evils are too prominent, and have too long employed the anxious cares of prudent testators, for this court to lend its sanction in any degree to impair the guards interposed by wills, whereby the rights of possession and enjoyment are withheld from devisees. As the testator could have cut them off altogether if he would, there is no ground for complaint recognized in courts of justice. And yet less ground for complaint is there in a case like the present, where an individual creditor of the husband seeks to defeat the plain provisions of the will, by an assumption that the marital rights superseded the executorial duties, and conferred a power to deliver possession, which the will expressly prohibited.

Mrs. Sessions attained the age of eighteen in June, 1840. In April, 1839, the act of Mississippi took effect, by which it is provided, that when any woman possessed of property in slaves shall marry, her property in such slaves, and their natural increase, shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband. And when any woman during coverture shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves shall enure and belong to the wife in like manner, as is above provided as to slaves which she may possess at the time of marriage.

As the right of distribution in this case was postponed until after the act of 1839 took effect, the wife could only take the slaves exempt from the husband's debts; we say, could, because it does not appear that the executors of Russell Smith have assented to the legacy and delivered possession to the legatee, Martha Ann.

Without saying more, we are of opinion the charge of the circuit court to the jury was proper, and that the judgment must be affirmed.

W. and D. H. DAVIESS *et al.*, Plaintiffs in Error, v. JOHN H. FAIRBAIRN *et al.*, HEIRS OF MARY E. FAIRBAIRN, deceased, Defendants in Error.

3 H. 636.

The act of Virginia of 1776, entitled "An act to enable persons living in other countries to dispose of their estates in this commonwealth with more ease and convenience," adopted by Kentucky, stood unrepealed in March, 1811, in Kentucky, so far as respects the mode of acknowledging a deed before a mayor or other chief magistrate of a city, &c.

THE case is stated in the opinion of the court.

Crittenden, for the plaintiffs.

Loughborough, contra.

* M'LEAN, J., delivered the opinion of the court. [* 643]

THIS case is brought here by a writ of error to the circuit court for the district of Kentucky.

The lessors of the plaintiff brought an action of ejectment, to recover a half-acre lot in the city of Louisville, numbered on the new plan of the city ninety-one. Richard Ferguson, Davies, and others, were made defendants. The jury found the defendants guilty, and a judgment was entered against them. On the trial, exceptions were taken to various rulings of the court, only one of which it is material to consider.

The court instructed the jury "that the deed of conveyance, by Thomas H. Fairbairn and wife, of the 12th of March, 1811, to the defendant, Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiffs, was not, in law, the deed of the *feme covert*, Maria E. Fairbairn; is not her deed of conveyance for any purpose whatever; and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy."

The plaintiffs below claimed as heirs at law of Maria E. Fairbairn. The fairness of the purchase of the lot by Ferguson was not controverted, nor that he paid for it an adequate consideration. The lot having descended to Maria E. Fairbairn, and her husband being dead, her heirs claim the property, on the ground that the acknowledgment of the deed by their mother, she being a *feme covert*, was defective. And so the court ruled in the above instruction.

The deed was acknowledged on the 12th of March, 1811, the day it bears date, by Elizabeth Henry, who signed it, and who had a dower interest in the lot, and by Fairbairn and wife; the latter being examined separate and apart from her husband, in due form, before

the mayor of Baltimore, who affixed his certificate and the seal of the corporation to the acknowledgment.

On the 20th of May, 1811, Warden Pope, clerk of the county court of Jefferson, in which Louisville is situated, certified that the deed was received in his office; and it being duly certified and authenticated, he recorded the same.

By the Virginia act of 1776, adopted by Kentucky, 4 Litt. Laws of Kentucky, 432, entitled "An act to enable persons living [*644] in other *countries to dispose of their estates in this commonwealth, with more ease and convenience," it was provided "that a person residing in any other county, for passing any lands and tenements in this commonwealth, by deed, shall acknowledge or prove the same before" the mayor or other chief magistrate of the city, town, or corporation, wherein or near to which he resides. But where there was no mayor or other chief magistrate within the county, then a certificate, under the hands and seals of two justices or magistrates of the county, that such proof or acknowledgment has been made before them, is sufficient. Without an acknowledgment, the fee did not pass under this statute. And "where any person making such conveyance shall be a *feme covert*, her interest in any lands or tenements shall not pass thereby, unless she shall personally acknowledge the same before such mayor or other chief magistrate, or before two justices or magistrates, as aforesaid." A privy examination is required, and the same being certified, the deed may be recorded in the county where the land lies. And such deed shall be effectual to pass all the interest of the *feme covert*.

The acknowledgment of the deed under consideration, in all respects, conforms to the requirements of the above act; and the important question is, whether, at the time of the acknowledgment, the act was in force? If the act had not been repealed, the deed is unquestionably valid.

The defendants in error contend that the above statute was repealed by the act of 1785, and also of 1796. The act of 1785 is entitled "An act for regulating conveyances," in the 1st section of which it is provided, "that no estate of inheritance, or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, unless acknowledged or proved before the general court, or before the court of the county, city, or corporation, in which the land is conveyed, or in the manner hereinafter directed," &c.

"When husband and wife shall have sealed and delivered a writ-

ing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, &c.; or if before two justices of the peace, of that county in which she dwells, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded," &c., shall be sufficient to convey her estate.

In this act, there is no express repeal of the act of 1776; consequently that act can only be repealed in so far as it may be repugnant to the subsequent act. They are both affirmative statutes, and such parts of the prior statute as may be incorporated into the subsequent one, as consistent with it, must be considered in force. This *is a settled rule of construction, and applies [*645] with peculiar force to these statutes. Their object was to prescribe certain modes by which real property within the commonwealth should be conveyed, by residents and non-residents, and also by *femes covert*; and it must be admitted, that no other modes of conveyance than those which are so prescribed will be valid. These forms have been adopted for the security of real property, and the convenience of individuals; hence we find in the statute-books of all the States, numerous acts regulating the signing, acknowledging, and recording of deeds.

If the act of 1785 be not repugnant in all its provisions to the act of 1776, yet, if the former clearly intended to prescribe the only modes by which real estate should be conveyed, it repeals the prior act. And this intention, it is said, is found in the act of 1785. To some extent, this may be correct. In the 1st section of that act, it is provided, that "no estate of inheritance in lands or tenements shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered." Now a deed, to be valid as a conveyance, under this statute, must be in writing, sealed and delivered. This is the common law definition of a deed. But there are other requisites to make this conveyance valid against a purchaser for a valuable consideration, without notice. The deed must be acknowledged as the statute requires, and lodged with the clerk for record. The conveyance as between the parties would be valid, under this statute, without acknowledgment, but unless acknowledged and recorded, or lodged for record, would not be notice to subsequent and innocent purchasers.

The acts under consideration provide specially the mode by which the estate of a *feme covert* shall be conveyed. In the act of 1785, her privy examination may be made in court, or by one of the judges thereof, or she may be examined by two justices of the peace of the

county where she resides, "who may be empowered to do so by commission," &c.

By the act of 1776, the acknowledgment and privy examination of a *feme covert* were required to be made before the mayor or other chief magistrate, or before two justices or magistrates of the town or place wherein she shall reside. The acknowledgment before two justices is retained in the act of 1785, with this additional requisite, that the justices shall be commissioned, as provided, to perform this duty. This necessarily repeals that part of the prior act which authorized the acknowledgment to be taken before two justices, without being commissioned. The latter act is, in this regard, repugnant to the former. The provisions cannot stand together, as the latter act superadds an essential qualification of the justices not required by the former. But the important question is, whether, as the act of 1785 made no provision authorizing a mayor of a city to take the acknowledgment of a *feme covert*, that provision in the act of 1776 is repealed by it. In this respect it is clear there is [* 646] no *repugnancy between the two acts. The two provisions may well stand together, the latter as cumulative to the former.

Does a fair interpretation of the act of 1785 authorize the inference, that the legislature intended no conveyance by a *feme covert* should be valid, unless acknowledged in the form prescribed by that act? We think no such inference can be drawn. In the 1st section of that act, in reference to ordinary acknowledgments of conveyances, in order, when recorded, that they might operate as notice to subsequent purchasers, it is required that the acknowledgment should be made as provided, "or in the manner hereinafter directed." The words here cited can have no bearing on the execution of a conveyance by a *feme covert*. In a subsequent part of the same section, provision is made for the execution of such an instrument, which is complete, without reference to any other part of the statute. The above words, therefore, could only refer to the conveyances spoken of in the first part of the section, and in order that they might operate, when recorded, as notice.

Upon a careful comparison of these statutes, as regards the point in controversy, we think there is no repeal of the act of 1776, by the act of 1785. There is no express repeal, no repugnancy, as regards the power of the mayor of a city to take the acknowledgment of a *feme covert*; nor on this point are there any words of the latter act which show an intention to make its provisions exclusive. We are therefore brought to the conclusion, looking only at these statutes, that the latter act, in this regard, may be considered as cumulative.

As having a strong and decided bearing on this view, we refer to *Wood v. The United States*, 16 Pet. 362. In that case, the court say: "The question then arises whether the 66th section of the act of 1799, c. 128, has been repealed, or whether it remains in full force. That it has not been expressly, or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

We come now to consider the act of 1796. The act of the 20th of December, 1792, concerning the relinquishment of dower, in the 2d section, provides that dower may be relinquished before two justices of the peace, where the parties reside out of the commonwealth, and the clerk of the county is required to certify that the persons taking the acknowledgment were justices, &c. This provision is repugnant to that of the act of 1785, which requires a commission to be issued to such justices.

* By the act of the 17th of December, 1795, two persons [* 647] were authorized to be appointed by joint ballot of the legislature, to revise the laws in force, &c. These persons, having been so appointed, reported the act of 1796, which is entitled "An act to reduce into one the several acts, or parts of acts, for regulating conveyances." In this act are included parts of the act of 1776, and nearly the whole of the act of 1785. It was passed the 19th of December, 1796, and with all other acts reported at the same time, was adopted by a general act, referring to the various acts, and providing that "so much of every act or acts before recited, as comes within the purview of this act, shall be and the same is hereby repealed from and after the 1st day of January, 1797," on which day the above act took effect.

That part of the act of 1776, authorizing the mayor of a city to take the acknowledgment of a *feme covert*, is not included in the act of 1796; nor were certain provisions of the act of 1748, "for settling the titles and bounds of lands," &c., included, some parts of which have since been recognized by the court of appeals of Kentucky, as in force.

Great reliance is placed by the counsel for the defendants in error, in the case of *Hynes's Representatives v. Campbell*, 6 T. B. Monr. 286. In that case the complainants prayed a rescission of the contract

Davies v. Fairbairn. 3 H.

for the conveyance of a certain tract of land, on the ground of a defect of title ; and the court held, that they were not bound to accept the deed for the land, tendered by the defendant, as some of the conveyances under which he claimed were not acknowledged and recorded, as the law required. The deeds thus objected to "were acknowledged before two justices of the peace of Dinwiddie county, Virginia, who certified simply that the grantor acknowledged the same before them, as the law required," without adding that the grantor "also subscribed the same in their presence." This proceeding was under the act of 1792, which had been construed to require a certificate of the justices that the deed had been subscribed in their presence, in regard to deeds executed within the State. And the court say, they turned their attention to the act of 1776, "and they find that it regulates only conveyances made out of the State, and that it provides for acknowledgment alone, before two justices of the peace, and says not a word about subscribing, and if that act is in force in this respect, it will exactly embrace the case in question." And they held that the above act was virtually repealed by the act of 1785, which requires that the two justices taking the acknowledgment should be commissioned to do so. This view of the court, as regards the acknowledgments of the deeds then before them, was undoubtedly correct. It is the construction which we have before given to this part of the act of 1785. The attention of the court was not drawn to any other point than the one before them. They did not

say that that part of the act of 1776 which regulates the [* 648] * acknowledgment by a *feme covert*, which is wholly different from the above, was repealed. It is true their language is general, but their meaning must be limited to the point under consideration. This decision, therefore, cannot be considered as having a bearing on the point now before us.

In the case of *Prewet v. Graves et al.* 5 J. J. Marshall, 120, the court say, that the 5th section of the act of 1748 had been repealed by subsequent and repugnant enactments. In *Miller et al. v. Henshaw and Co.* 4 Dana, 325, they say, in reference to the act of 1776, and to the decision of *Hynes's Representatives v. Campbell*, above cited, that the act of 1776 "is nowhere repealed by express words, but only by construction, in consequence of the inconsistency of its provisions with those of subsequent statutes; and as none of the subsequent statutes relate to the authentication of deeds of personalty, out of the State, except those which reduce the number of witnesses from three to two, there can be no inconsistency, and therefore no constructive repeal of so much of this statute as relates to deeds of personalty, except as to the number of witnesses."

In *McGowen v. Hoy*, 5 Litt. 244, the court held the act of 1748 was in force in Kentucky, in regard to the acknowledgment and recording of mortgages and deeds of trust. By the act of 1796, a deed, executed out of the commonwealth, for lands within it, was required to be recorded in eight months. The act of 1785, which preceded it, required such deed to be recorded in eighteen months; and in *Taylor v. Shields*, 5 Litt. 297, the question was, whether the latter of these acts, in this respect, had repealed the former; and the court say, "we should hesitate much to give such effect to the latter statute." "Virtual repeals are not favored by courts. A body of acts ought to be held as one act, so far as they do not conflict with each other. Here the same restriction to the 'manner prescribed by law,' existed before the passage of our act, as well as afterwards; and if, in transcribing the Virginia code into ours, any part shall be adjudged to be repealed, barely by putting in the date of transcribing as the date of the law, and because the provision so transcribed, shall apparently conflict with any former part not so transcribed, it may be of serious consequence to the community." "We incline," the court say, to the opinion, "that the clause in our statute, (of 1796,) 'in the manner prescribed by law,' meant to retain, and was intended to retain, former provisions, with regard to deeds entire;" and they held, that the recording of the deed within eighteen months, under the act of 1785, was sufficient.

That part of the act of 1785, which regulated the time of recording deeds, executed without the commonwealth, was not copied into the act of 1796, and yet the court held that the latter act, in this respect, did not repeal the former.

In *Elliott et al. v. Peirsol et al.* 1 Pet. 339, this court say, the Virginia statute of 1748 "was adopted in Kentucky, at her separation from Virginia, and is understood never to have [* 649] been repealed."

It does not appear that the question, as to the validity of the acknowledgment of a deed before the mayor of a city, by a *feme covert*, under the act of 1776, since that of 1785, has been enacted, has ever been decided. Some general expressions, as above stated, have been used by the court of appeals, in regard to the repeal of the former act by the latter, but those expressions did not relate to the above question. And it may be again observed, that those remarks by the court of appeals can only be held to apply to the matter then before them; and that a more extended application of them would be inconsistent with the views taken by the same court, in the other cases cited. If the provision in the act of 1785, requiring a deed executed out of the State to be recorded in eighteen

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months, is not repealed by the act of 1796, requiring such deed to be recorded in eight months, is the act of 1776, authorizing the acknowledgment of a deed before a mayor, by a *feme covert*, repealed by subsequent acts? None of those acts repeal, in terms, the above provision in the act of 1776, and they contain no repugnant provision. Consequently, the first act stands unrepealed. The different acts on the same subject, in the language of the court of appeals, must be "considered as one act." In this view, the provision in question stands consistently with all the subsequent statutes; and on this ground we feel authorized to say, that the acknowledgment of the deed before us is valid, under the act of 1776, and that it conveyed to Ferguson, the grantee, a good title in fee-simple. The clause of the act of 1796, "repealing so much of the acts referred to as come within the purview of that act," extends no further than the repugnancy of the act of 1796 to the provisions of the acts named.

Upon the whole, the judgment of the circuit court is reversed, at the costs of the defendants, and the cause be remanded, &c.

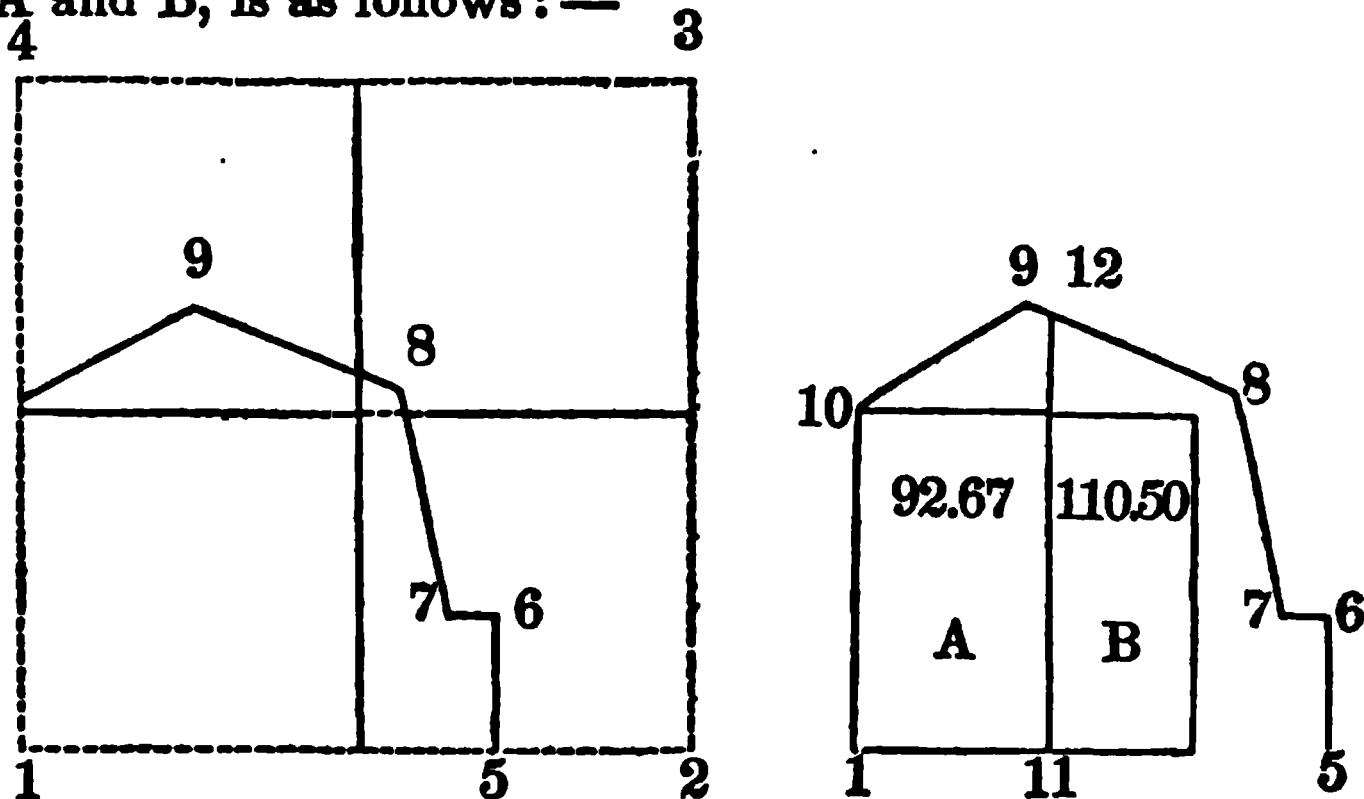
LESSEE OF WILLIAM L. BROWN and Wife, Plaintiff in Error, v. JOSEPH CLEMENTS and JONATHAN HUNT, Defendants in Error.

3 H. 650.

Under the first section of the act of April 24, 1820, (3 Stats. at Large, 566,) and the instructions of the secretary of the treasury, the surveyor-general was bound to divide fractional sections into as many half-quarter sections as practicable, by north and south, or east and west lines, so as to preserve the most compact forms; and if this be not done, the register can not lawfully sell the land, and the act of the surveyor-general, in making a different division, is void.

A patent which, by reason of such a void survey and division, appropriates to one preemption claim, what belongs to another, is void, as against the owner of the latter claim.

THE case is stated in the opinion of the court. The plat referred to, which shows the division actually made by the surveyor into the parts A and B, is as follows:—



Willis Hall and Sherman, for the plaintiff.

Jones, contra.

* M'KINLEY, J., delivered the opinion of the court. [* 660]

This case comes before this court on a writ of error to the supreme court of the State of Alabama.

The plaintiffs brought an action of ejectment against the defendants, in the circuit court for the county of Mobile, in said State; and upon the trial, they read in evidence the following claim and entry: "To the register and receiver of the land-office at St. Stephen's: You will please to take notice, that I, James Etheridge, of Mobile county, Alabama, claim the right of preëmption, under the act of congress, of the 29th of May, 1830,¹ to the southwest quarter section 22, township 4, range 1 west;" and that, on the 28th day of January, 1831, the said James Etheridge made the necessary proof that he had planted and cultivated said quarter section in the year 1829, and remained in possession until after the 29th day of May, 1830. The plaintiff also read in evidence a patent from the United States, bearing date the 30th day of May, 1833, reciting that, "Whereas James Etheridge, of Mobile county, Alabama, has deposited in the general land-office of the United States, a certificate of the register of the land-office at St. Stephen's, whereby it appears that payment has been made by the said James Etheridge, according to the provisions of the act of congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the southwest quarter of section 22, in township 4, south of range 1 west, in the district of lands subject to sale at St. Stephen's, Alabama, containing 92 acres and 67 hundredths of an acre, according to the official plat of the survey of the said lands, returned to the general land-office by the surveyor-general, which said tract has been purchased by the said James Etheridge:—

"Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of congress, in such case made and provided, have given and granted, and by these presents do give and grant, unto the said James Etheridge, and to his heirs, the said tract, above described, &c."

* In obedience to an order of the circuit court, the surveyor of Mobile county went upon the land in controversy, [* 661] and made an actual survey, and returned a plat thereof into court, showing that the section 22 was covered by private land claims, ex-

¹ 4 Stats. at Large, 420.

cept the whole of the southwest quarter, on which James Etheridge had made his entry; and a small fraction in the southeast quarter, entered, under the preëmption law, by William D. Stone; and a fraction in the northeast and northwest quarters of said section; which plat was given in evidence to the jury. And the plaintiffs proved, by the surveyor, that he found the southwest corner of said fractional section as shown by the plat returned; and also found, on the section lines of said fractional section, the half-mile posts, each post being half a mile from the southwest corner of said fractional section; that these posts bore evidence of being those put down by the surveyor of the United States, on running the section lines; that an entire southwest quarter section exists in said fractional section, without interfering with any private land claim, leaving a residuum on the north and the east of said quarter section.

The defendants gave in evidence to the jury the following claim and entry, made by the said William D. Stone: "To the register and receiver of the land-office at St. Stephen's, Alabama: You will please to take notice, that I, William D. Stone, of Mobile county, Alabama, claim the right of preëmption, under the act of congress of the 29th of May, 1830, to the fraction situated in the west part of the southeast quarter of section 22, in township 4, range 1 west of 13." And on the 25th of March, 1831, he made the necessary affidavit and proof to show that he had planted and cultivated the above-described tract of land, according to said act of the 29th of May, 1830. And they also gave in evidence the following patent: "The United States of America, to all to whom these presents shall come, greeting: Whereas William D. Stone, of Mobile, has deposited in the general land-office of the United States, a certificate of the register of the land-office at St. Stephen's, whereby it appears that full payment has been made by the said William D. Stone, according to the act of congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the southeast subdivision of fractional section 22, in township 4 south, of range 1 west, in the district of lands subject to sale at St. Stephen's, Alabama, containing 110 acres, and 51 hundredths of an acre, according to the official plat of the surveyor of said land, returned to the general land-office by the surveyor-general; which said tract has been purchased by the said William D. Stone: Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said William D. Stone, and [* 662] his heirs, the said tract above described," &c. * And it was

admitted by the plaintiffs, that the defendants had all the rights of said Stone in the land admitted to have been in their possession, at the time of the service of the declaration; and the defendants admitted that the plaintiffs had, at the date of the demise, and time of trial, all the rights of said patentee, Etheridge, in the land described in the declaration.

And the parties "not wishing to incumber the record, by copying from the book entitled 'General Acts of Congress respecting the sale and disposition of the public lands, with instructions issued, from time to time, by the secretary of the treasury, and commissioner of the general land-office, and official opinions of the attorney-general, on questions arising under the land laws;' and which instructions in the 2d vol., part the 2d, prepared and printed by the senate, agree that said book may be used by either party, and any thing therein contained read as illustration of the practice of the land-office, and construction that the acts of congress had received in that branch of the government. The same work can be referred to, by either party, in the supreme court, for the purpose aforesaid. The parties further agree that the exhibit, No. 2, being the official plat of the survey of the township described in the patents of both plaintiffs and defendants, between pages 134 and 135, shall be referred to as if the same was incorporated with, and formed a part of the record in this cause." This statement furnishes all the evidence deemed necessary and pertinent to the investigation of the questions involved in the principal instruction of the circuit court, to the jury, on the trial of the cause; which instruction is as follows: "The court further instructed the jury, that, if said fractional section No. 22, was capable of being subdivided into an entire southwest quarter section, and two half-quarter sections, leaving a residuum, as shown by said map and evidence of the county surveyor, still, the surveyor-general was not required, under the acts of congress providing for the subdivisions of the public lands, and the instructions of the secretary of the treasury, made under the act of the 24th of April, 1820, entitled 'An act, making further provision for the sale of the public lands,' to make in his subdivision of the same, either such quarter section, or half-quarter sections; but might lawfully subdivide the same into two lots, A and B; as indicated by said plat of 1832; and that under said evidence, Etheridge's title would not hold the whole southwest quarter of said fractional section, but only lot A; and that Stone's title would hold lot B, being the balance of said fractional section." To this instruction the plaintiffs excepted.

Upon the construction here given to the act of congress, and to the

instructions of the secretary of the treasury thereon, referred to in the above instruction of the court, depends the whole controversy between the parties to this suit. The 1st section of the act of congress

above referred to, is in these words: "That from and after [* 663] * the 1st day of July next, all the public lands of the United States, the sale of which is, or may be, authorized by law, shall, when offered at public sale to the highest bidder, be offered in half-quarter sections; and when offered at private sale, may be purchased, at the option of the purchaser, either in entire sections, half sections, quarter sections, or half-quarter sections; and in every case of the division of a quarter section, the line for the division thereof shall run north and south, and the corners and contents of half-quarter sections, which may hereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the second section of an act, entitled 'An act concerning the mode of surveying the public lands of the United States,' passed the 11th day of February, 1805,¹ and fractional sections, containing 160 acres, or upwards, shall, in like manner, as nearly as practicable, be subdivided into half-quarter sections, under such rules and regulations as may be prescribed by the secretary of the treasury." 3 Story's Laws, 1774.

The settled policy of congress has been to survey the public lands in square figures, running the lines north and south, and east and west, and to extend the subdivisions authorized by law, as far as practicable, in square figures, to the lowest denomination.

The second section of the act of the 18th of May, 1796,² c. 29, directs that the public lands "shall be divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships six miles square, unless where the line of the late Indian purchase, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable, and then this rule shall not be departed from further than such particular circumstances may require." After directing how townships should be divided into sections, it directs that "fractional townships shall be divided into sections in manner aforesaid, and the fractions of sections shall be annexed to, and sold with, the adjacent entire sections." 1 Story's Laws, 422. The lowest denomination authorized by this act, was sections; but the direction to the surveyor was to divide the fractional townships into as many sections as the particular circumstances would permit. And so by the 1st section of the act of the 24th of April, 1820, the surveyor is directed to subdivide fractional sections, containing

¹ 2 Stats. at Large, 313.

² 1 Ib. 465.

one hundred and sixty acres and upwards, into as many half-quarter sections as practicable, by running the lines north and south. And this statute conferred no power on the secretary of the treasury to make any regulation, by which a fractional section might be divided into any quarter, or other subdivision than half-quarter sections. The only authority he acquired by the statute, was to make such rules and regulations as would enable the surveyor to make the greatest number of half-quarter sections out of a fractional section, by running the lines north and south, or east and west; and this *power he executed, by his circular letter, to the surveyors general, of the 10th of June, 1820, 2d part, Public Land Laws, &c., 820.

Had the surveyor-general subdivided the fractional section 22, now in controversy, according to law, there would have been two half-quarter sections in the southwest quarter, making that quarter complete, a fractional section in the southeast quarter, and a fractional section in the northeast and northwest quarters, making four tracts or subdivisions instead of two, as returned by him to the land-office of the district. None of the lines, subdividing sections, are required by law to be made by actual survey, and marked on the land; but they are to be delineated on the township plats, according to the 2d section of the act of the 11th of February, 1805, c. 74, referred to in the act of the 24th of April, 1820, 2 Story's Laws, 961. When the township and section lines are run, and the corners marked according to law, the quarter-section lines are ascertained on the plat by protracting lines across the section north and south, and east and west, equidistant from the section lines, and so of other subdivisions. And a surveyor going on the land to ascertain the boundary of a quarter, or half-quarter section, would do it with as much ease and certainty as if it had been delineated on the plat by the surveyor-general. Extending the subdividing lines on the township plats, is not, therefore, essentially necessary to enable the register to sell the land, or to give title to the purchaser. The register is as much bound to know what is a legal subdivision of a section, or fractional section, as is the surveyor-general.

Because he is directed by law to offer the lands, when sold at public sale, in half-quarter sections. To enable him to perform this duty, he must know what a half-quarter section is. And before he can offer a fractional section for sale, he must see that it has been subdivided, so as to enable him to offer as much of it in half-quarter sections as practicable. When Etheridge applied to purchase the southwest quarter of this fractional section at private sale, as he had a right to do, under the act granting preëmption rights, the

register was bound to know whether such a subdivision could be obtained according to law. A bare inspection of the township plat must have satisfied him, in this case, that it was practicable to obtain an entire quarter section in the southwest corner of the fractional section 22. The 1st section of the act of the 24th of April, 1820, directed that this fractional section should be divided into as many half-quarter sections as practicable, by lines north and south; and the instructions given by the secretary of the treasury under this act, directed that it should be divided into half-quarter sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms.

There is nothing in any of the acts of congress, nor in the instructions of the secretary of the treasury, to authorize the division [* 665] of * this fractional section made by the surveyor-general; and it being a violation of the law, and contrary to the duties of his office, it must be regarded as a void act. *Miller and others, v. Kerr and others*, 7 Wheat. 1. So far as Stone's claim was concerned, this division of the fractional section has been treated by the register and the commissioner of the general land-office as a legal subdivision, and the register seems to have disregarded entirely the act granting pre-emption rights, and Stone's claim and proofs under it, and to have transferred his claim to the western lot of the fractional section as divided by the surveyor-general. The certificate of the register, recited in the patent of Etheridge, takes no notice of this subdivision of the fractional section, but states that Etheridge had "purchased of the register the lot or southwest quarter of section number 22," &c. The patent is for the whole of the southwest quarter of section 22, by its proper designation, and if no quantity of land had been expressed in it, all the land contained in the quarter-section would have passed, by the patent, to Etheridge; because, by the 2d section of the act of the 11th of February, 1805, before referred to, it is provided that "half sections and quarter sections, the contents of which had not been returned, shall be held and considered as containing the one half, or the one fourth respectively, of the contents of the section of which they make part." The surveyor failed to return the contents of the quarter section in this case; it was liable, therefore, to be sold by the above rule. But it has been insisted that Etheridge, and those claiming under him, were bound, and concluded by the number of acres expressed in the patent. It is evident the quarter section was not referred to for the number of acres contained in it; but by express words reference was made to the plat returned by the surveyor-general, showing the division of the fractional section into two parts, one of which con

tains the number of acres expressed in Etheridge's patent, and the other the number of acres expressed in Stone's patent. It has been already shown that this plat was illegal, and the subdivision of the fractional section void; and any reference, therefore, to this plat, to show the number of acres granted to Etheridge, is illegal and inconsistent with every previous step taken towards perfecting his title, and utterly repugnant to the previous words of grant used in the patent.

Thus it appears, that neither the claim of Etheridge, filed with the register, the certificate of purchase issued by him, nor the patent issued to Etheridge by the commissioner of the general land-office, is founded on the division of the fractional section made by the surveyor general; but the whole appears to be founded on the subdivision of the fractional section into one quarter section, and two fractional sections, made by actual survey on the land. It is true that, in undertaking to state the quantity of land contained in the quarter section, reference is made to what is there called the official plat of the lands returned to the general land-office by the surveyor-

*general, which is nothing more than a reference to this [* 666] same subdivision of the fractional section so often mentioned.

But this question necessarily arises: How can the contents of either division of the fractional section, thus divided into two lots or subdivisions, show the contents or number of acres in the southwest quarter of the same section? The ninety-two acres and sixty-seven hundredths of an acre mentioned in the patent, is the number of acres contained in the western subdivision of said fractional section, and consists of part of the southwest, and part of the northwest quarters of the fractional section, as appears by the plat used on the trial. No part of the northwest quarter of this fractional section can by any reasonable construction be considered as being within and part of the land included in a patent for the southwest quarter of the section. This proves that the reference to this plat, in Etheridge's patent, is both delusive and illegal, and must, therefore, be rejected as void and inoperative.

The act of the 29th of May, 1830, to grant preëmption rights to settlers on the public lands, c. 209, appropriated this quarter section of land, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time this quarter section was not liable to any other claim, or to be sold to any other person, except at public sale, under the proclamation of the President of the United States; and that Etheridge had a right to prevent, by paying for it as directed by the act. And as he has complied with all the requisitions of the act, as far as the mistakes and

illegal acts of the ministerial officers of the government would permit, he has acquired a good title by his patent, against the United States, for the whole of said southwest quarter section. The remaining question is, whether Etheridge's title is good against Stone's patent? Stone claimed "the right of preëmption, under the act of congress of the 29th of May, 1830, to the fraction situated in the west part of the southeast quarter of section 22, in township 4, range 1 west." This claim confined his preëmption right to that specific fraction. And although the act gave to every settler on the public lands the right of preëmption of one hundred and sixty acres, yet if a settler happened to be seated on a fractional section, containing less than that quantity, there is no provision in the act by which he could make up the deficiency, out of the adjacent lands, or any other lands. The only case provided for in the act, by which the preëmptioner had the right to enter land outside of the quarter or fractional section, on which he was settled at the passage of the act, is the case provided for in the 2d section. When two or more persons were settled on the same quarter section, it might be divided between the first two settlers, and each be entitled to a preëmption of eighty acres of land elsewhere, in the same land district. But, in this case, Stone was not only permitted to take land, out-
[* 667] * side of the fractional section, on which he was settled, but he was permitted to take land on which Etheridge was settled, and to which he had previously proved his right under the same act of congress.

In the case of *Lindsay and others v. Miller and others*, 6 Pet. 674, the plaintiffs in ejectment claimed title under a patent, dated the 1st of December, 1824, founded on an entry and survey made in the same year. The defendants claimed title under an entry, made in January, 1783, upon a military warrant, for services rendered in the Virginia state line, and a survey made thereon, in the same month, and recorded on the 7th of April, of the same year, and a patent, issued by the State of Virginia, in March, 1789. This land lay in what is called the military district, between the rivers Sciota and Little Miami, in the State of Ohio. This district had been reserved, in the deed of cession, dated the 1st of March, 1784, made by Virginia to the United States, to satisfy the claims of the Virginia troops on continental establishment, in the event of there not being sufficient good land for that purpose in a reservation previously made by Virginia on the southeast side of the Ohio River. Although the defendants proved possession, under this title, for upwards of thirty years, the entry, survey, and patent, were adjudged by the court to be void, on the ground that the land had been reserved for the satisfaction of

military warrants, granted for services of the Virginia troops on continental establishment, and was not, therefore, subject to entry upon warrants for services rendered in the Virginia state line.

In the case before the court, all the land in the southwest quarter of the fractional section had been appropriated, by law, to satisfy Etheridge's claim, and no other land could be substituted in lieu of that quarter section, for any part of it. Stone's claim arose under the same law, and by the same provisions was confined to the fraction in the west part of the southeast quarter of the same section, and gave no right to land elsewhere. So much of the patent to Stone as purports to grant land within the southwest quarter of the section is, therefore, not only an appropriation of land to his claim, not subject to it according to the act, but which, by the same act, had been appropriated to another claim arising under the same act, concurrent with and equal in all respects to Stone's claim. How, then, could his patent give him title to land that was not subject to his claim; land that he never had legally claimed; and to land that, by law, had been appropriated to and claimed by another? It seems to us this case is clearly within the principles settled in the case above referred to, and that the patent granted to Stone is void, for so much of the land included in it as lies within the said southwest quarter of the fractional section, and for which Etheridge holds a patent.

It has been insisted, however, that as Etheridge only paid for the quantity of land mentioned in his patent, that he can have no right * to land paid for by Stone, and included in his [* 668] patent. This is one of the results of the mistaken and illegal acts of the ministerial officers of the government, which, as already shown, can neither benefit one party, nor prejudice the rights of the other. The United States have received full payment for all the land contained in both patents. And if Stone has paid for land which belonged to Etheridge, that is a matter to be adjusted between themselves, amicably, or by law, as they may choose.

Upon a full view of the whole case, it is the opinion of the court that the judgment of the supreme court of Alabama be reversed.

CATRON, J. I feel myself bound to dissent from the foregoing opinion, for the following reasons: —

1. By the act of 29th May, 1830, a preëmption-right settler then in possession was entitled to enter with the register of the land-office in the district where the land lay, by legal subdivisions, not more than one hundred and sixty acres.

The controversy before us turns partly on what was the true "legal

subdivision" of fractional section 22, containing two hundred and three acres. This must be ascertained from the laws on the subject existing in 1830. The lines of public surveys actually run and marked in the field, are township extensions, and section boundaries; the lines dividing sections into quarters, half quarters, (and quarter-quarters since 1832,¹) being only indicated or depicted upon the township plats returned, and recorded in the office of the register.

The act of 26th March, 1804,² provides, for the first time, for the sale of the public lands in quarter sections, and also directs (sect. 9) that fractional sections shall be sold entire, or by uniting two or more together. The act of February 11, 1805, directs with absolute precision, leaving no discretion on the subject, the manner in which full sections shall be divided into quarters, but makes no provision for the subdivision of fractional sections. It was not until the passing of the act of April 24, 1820, that these were authorized to be subdivided, and then only when they contained more than one hundred and sixty acres. The act of 1820, in directing the manner in which full sections shall be subdivided into half quarters, or eighty acre lots, is as absolutely precise in its provisions as that of 1805; and, as in the former case, gives no discretionary power so far as these subdivisions are concerned; but in authorizing the subdivision of fractional sections containing one hundred and sixty acres and upwards, it directs that they shall, in like manner, "as nearly as practicable," be subdivided into half-quarter sections, or eighty acre lots, "under such rules and regulations as may be prescribed by the secretary of the treasury."

Under the discretionary power here given, rules and regulations were prescribed by Secretary Crawford on the 10th of June, 1820, [* 669] (2 Land Laws and Opinions, * p. 820, No. 796.) A circular was addressed to the surveyors-general of that date for their government in this respect, by the commissioner of the general land-office. It orders that fractional sections, containing more than one hundred and sixty acres, shall be divided into half-quarter sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms. "You will, therefore," says the commissioner, "be pleased to divide the fractional sections in your district, (which remain unsold,) in the manner above directed, and report to this office, and to the registers of the land district in which those fractions respectively are situate, the subdivisions, together with the quantity in each. It is not intended to run the subdivisional lines, and mark them, but merely to make them upon your surveys, and calculate the quantity of land in each subdivision."

¹ 4 Stats. at Large, 503.

² 2 Ib. 277.

In January, 1826, (2 Land Laws, p. 583, No. 841,) further instructions were given on this subject to the surveyor-general, at Washington, Mississippi. The commissioner says, among other things: "A fractional section is a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of rivers, &c., and containing a less quantity than six hundred and forty acres."

Speaking of the regulations, and the circular letter founded on them, the commissioner continues: "The substance of the rule is that fractional sections of one hundred and sixty acres and upwards are to be subdivided by east and west, or north and south lines, at the discretion of the surveyor, so as to preserve the most compact and convenient forms. Each lot to be, as nearly as practicable, a half-quarter section, containing a quantity of eighty acres; sometimes rather more, sometimes less, as the locality demands."

According to these instructions, fraction No. 22 was divided; two precise eighty acre tracts could not be made out of it; half quarters, or eighty acres, was the least quantity that could be sold by the act of 1820, if in regular form, and part of a full section; but if in irregular form, and the fraction of a section containing upwards of one hundred and sixty acres, then it was left to the secretary to cause it to be subdivided according to his own regulations, into two or more tracts, approaching, "as nearly as practicable," to eighty acres each. He directed the subdivisions to be made in all cases so as to preserve the most compact and salable forms, accommodating the tracts to the sides of rivers, or other legal intervening boundaries, to subserve the best interests of the government. This practice has prevailed as the governing rule for nearly a quarter of a century, and is now in full operation; large quantities of land have been sold thus subdivided, and great quantities yet remain to be sold. I speak on information derived from the commissioner of the general land-office. The idea of taking out of a fraction a quarter section of one hundred and sixty acres, if found there, as if the section was entire, and leaving surrounding strips of a few acres each, * unsala- [* 670] ble, and of little or no value, as will be the case here, never has been entertained at that office, as the true construction of the act of 1820, from the date of Mr. Crawford's instructions, (June 10, 1820,) up to this time. On mature consideration, I think the instructions given legitimately within the authority conferred on the secretary. In this view of the law, as applicable to the present case, I am supported by the opinion of the attorney-general, given on Etheridge's claim in 1837, (2 Land Laws and Opinions, p. 136, No. 85.)

2. Suppose, however, it was doubtful whether they were or not authorized, is it admissible for the courts of justice, after such a lapse

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of time, to call in question the construction given to the act; to disturb so many titles taken under it, and to break up existing subdivisions? The sole authority to which the act referred for its exposition, and the prescribing of rules and regulations to carry it into execution, was the secretary of the treasury. His jurisdiction was subject to no supervision; he was constituted the only judge, from whose decision there was no appeal on part of purchasers; they were compelled to buy in the form and quantity the lands were offered for sale, or not be permitted to purchase at all. The secretary having adjudged and settled the construction of the act according to his views of its true meaning, and this coeval with its passage — a strong circumstance — the government, in its executive and political departments, and the community at large, concerned in purchasing from the government, having acquiesced without complaint, recognizing the construction as the true one, through so great a lapse of years, it is now supposed by me the duty of this court, on the question being presented here, and that for the first time, to acquiesce also. That these subdivisions are for the best interests of the United States, is manifest; all others have abided by them, and so should the plaintiff.

If one of our own judgments, made in 1820, coeval with the statute, had produced similar consequences; if many thousands of titles rested on it, (as there surely do on Mr. Crawford's instructions,) I should feel myself wholly unauthorized, at this day, to overthrow the decision, however doubtful I might think it to be. The conservative rule of *communis error facit jus*, is universal in courts of justice, in regard to their own judgments, under such circumstances, and undoubted judicial propriety requires its adoption, as it seems to me, when dealing with the decision of the secretary in the present instance. This course is peculiarly due to the repose of titles, and the stable maintenance of an established system in a great department — a system that cannot be changed in this respect without much expense, confusion, and delay, in the administration of that department.

3. But suppose the secretary was mistaken, and the subdivision of fractional section 22 is illegal, what then is the plaintiff's case? His title is a patent; on his legal title he must recover, therefore [*671] he cannot be heard to say his patent is void, because founded on an illegal subdivision; the question, then, is reduced to this — what does the patent cover? Etheridge had no peculiar rights by the act of 1830, save that he had a preference of entry; like others purchasing of the United States, he was compelled to buy in legal subdivisions; before 1820, not less than an entire

fractional section could be sold ; nor after the act of that year, could one be sold in subdivisions until divided, under regulations by the secretary of the treasury. Further than this, the act of 1805 remained unchanged as to fractions. Etheridge could not be permitted to treat a quarter section in a fraction, although found there, as if it was found in an entire section. He did attempt it, in proving up his preference right, but when he applied to enter at the land-office, the register rejected his claim, and compelled him to take the land on which he resided, in the form and quantity it had been laid off, according to the instructions ; and this he did take. The government is bound by its patent ; is estopped to disavow the subdivision granted ; and as estoppels are mutual, Etheridge is equally bound by the grant. It recites the patent certificate ; this says it is for ninety-two acres and sixty-seven hundredths, bounded "according to the official plat of the survey of the said lands, returned to the general land-office by the surveyor-general ; which said tract, described in the plat returned, has been purchased by the said James Etheridge." The plat is part of the patent certificate ; is referred to in the patent, and is part of that also, just as much as if it was attached to the same paper. By the plats of public surveys, lands must be identified, and the boundaries ascertained, in all cases of the kind. The parties agree of record that exhibit No. 2 is the official map described in the patent of Etheridge ; according to this, he purchased lot A for ninety-two acres and sixty-seven hundredths ; his eastern boundary being the red line made by the surveyor-general, pursuant to the instructions. This was undoubtedly the land the government intended to sell, and, as I think, as certainly the same Etheridge intended to buy, and did buy ; of course, he can recover no land east of that line, and, therefore, the judgment ought to be affirmed, even if the instructions were illegal and void.

4. The case does not stop here ; Stone's patent is elder than Etheridge's ; the same plat is referred to in each ; Stone's is for the one hundred and ten acres and fifty hundredths east of the red line. This is not disputed. To overcome it, Etheridge's patent must be supported by a legal entry for the same land, elder than Stone's patent. As already stated, until Etheridge paid his money, he could have no legal entry from which to date his title. There being no such subdivision existing in law as the southwest quarter of fractional section 22, when Etheridge presented his occupant claim, he could not be permitted to enter in that form, or for that quantity. Such was the express instruction of May 31, 1831, (2 Land * Laws [* 672] and Instructions, No. 497, and again in No. 521.) The first subdivision was created afterwards by the act of the surveyor-

general, and is indicated by the red line. That it is denominated the southwest quarter in the patent, amounts, in my judgment, to very little; thus the department saw proper to call such subdivisions; the denomination was arbitrary, and not precise; but we cannot discard the substance for the sake of correcting terms of description open to verbal criticism. The land contained in the plat referred to in Etheridge's patent, is a technical quarter section, in the language of the general land-office; and such subdivisions are known by no other name there, as will be seen by No. 483 and No. 486 in the volume of Instructions above referred to. Thus, in No. 483, dated July 28, 1830, the commissioner instructs the register at Mount Salus, that the preëmption law of that year restricted the quantity to be located to one hundred and sixty acres, or a quarter section; but that it did not intend that an excess over one hundred and sixty acres, "in a tract of land technically known as a quarter section," should be cut off, so as to restrict the quantity literally to one hundred and sixty acres. "The law, (says he,) having taken it for granted that every quarter section contains one hundred and sixty acres, which not being the fact, we must be guided by what we know to be the spirit and intention of the law." He then instructs the register, in cases of fractional sections, to conform to the subdivisions as made by the surveyor-general, and to give the quantity as near as practicable.

No. 486 is a general circular, dated September 14, 1830, on the same subject in part. Instruction 8 directs: "Although a quarter section may be found to contain rather more than the ordinary quantity of one hundred and sixty acres, the right of preëmption is extended to the full quantity of such quarter section." In the language, therefore, of the general land-office, the southwest quarter of fractional section 22, called for in Etheridge's patent, is as well known by its designation, as if the section was entire. This the Instruction No. 497 above, explains, where the subdivided quantity is less, to be a "technical" quarter also, as well as if the quantity had been more. But if there be uncertainty here, as in former cases, we must refer to the plat and quantity to explain the uncertainty. This course was pursued in the case of *McIver v. Walker*, 9 Cranch, 173, and again in 4 Wheaton, 444. There the plat was held to control the face of the patent, and fixed a different locality, because Crow Creek was laid down on the plat, nearly through its centre; the location certificate copied in the patent, as in this case, called for a beginning, and for courses from that point, running off from the creek, which was not named as being crossed by the lines; yet this court disregarded the calls, and held the land lay on both sides of the creek, as indicated in the naked plat. It was a much weaker case than the present.

In patents of the United States, from their earliest date down to this day, nothing is referred to but *numbers on [*673] the public surveys. To hold that the surveys did not explain and control the patent as to identity, and side lines, would be an abandonment of both, as nothing else can establish either.

Much stress is laid on the fact that the half-mile post is found on the south boundary of section 22. The same line-marks are uniformly made on all sectional lines, regardless of fractions; so it would have been done had the fraction 22 been for less than 160 acres, and not subjected to subdivision. The section south may have been entire, and the corner post necessary for the purposes of that section.

Another difficulty stands in the way of the plaintiff's recovery. Stone's patent is the elder; it is admitted it covers the land in dispute — the patent passed the perfect and consummate title; in an action of ejectment the patent is conclusive, as was held by this court in *Wilcox v. Jackson*, and *Bagnell v. Broderick*, 13 Pet. 516, 450. You can only go behind it, and give it earlier date, from a precise legal entry for the same land made by the grantee, to overreach an elder patent; as this court held in *Ross v. Barland*, 1 Pet. 655. We have seen Etheridge did not enter the land in dispute when he paid his money, and took his patent certificate. To overthrow Stone's patent, we must rely on the preference right to enter. At best, it is a remote and doubtful equity; Stone paid for the land, (and if the assumption be true,) has an equity attached to it for his purchase-money; presenting a case of conflicting equities, with which a court of law cannot deal. In the language of this court in *Bagnell v. Broderick*, "we are bound to presume for the purposes of this action, that all previous legal steps had been taken by Stone to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Etheridge; and having obtained the patent, Stone had the best title known to a court of law, to wit, the fee." There, a much more imposing equity than Etheridge can pretend to, was set up. In no respect, therefore, is there any ground for reversing the decision of the supreme court of Alabama, as is supposed by me.

In the case of *Brown et ux. v. Hunt*, Mr. Justice DANIEL dissents from the opinion of the court, and concurs in opinion with Mr. Chief Justice and Mr. Justice CATRON.

Clymer's Lessee v. Dawkins. 3 H.

LESSEE OF GEORGE CLYMER *et al.*, Plaintiff in Error, v. GEORGE
DAWKINS *et al.*, Defendants in Error.

3 H. 674.

Though the entry and possession of one tenant in common is, generally, the entry and possession of all the tenants, yet if one enter on part of the land, under a partition, claiming that part in severalty, his possession is adverse to the co-tenants, and though the partition be invalid, the statute of limitations runs against the co-tenants.

THE case is stated in the opinion of the court, save that the prayers and instructions therein referred to were as follows.

[* 677] * The plaintiff asked the court to instruct the jury.

1. That if the jury believe, from the evidence, that the defendants, or others under whom they claim, entered upon the land in contest under the claim of Clymer, Lynch, and Blanton, for 11,000 acres, that such of the defendants as the jury may find so entered, by themselves or others under whom they claim, cannot avail themselves of the elder patents read in evidence, as to defeat the plaintiff in this action.

2. That the defendants cannot defeat the plaintiff's right to recover, if the jury believe, from the evidence, the plaintiff ever had right, by reason of the statute of limitation, provided the jury believe, from the evidence, that the defendants, or those under whom they claim, entered upon the land in contest, under the title of Clymer, Lynch, and Blanton, for the 11,000 acres patented to them.

3. That if the jury find, from the evidence, that any of the defendants entered upon the land in contest, under a parol contract of purchase from the agent of Lynch and Blanton, who were tenants in common with Clymer in the 11,000 acre patent, read in evidence; and the jury also find that such of the defendants as so purchased never notified the patentee, Clymer, or the trustees named in his will and codicil, or either of them, that they held adversely to Clymer's title, that the defendants, as to whom the jury may so find, cannot avail themselves of the statute of limitation in defence of this action. Also,

4. That such defendants as the jury may find as above mentioned, if there be any such, cannot avail themselves of the outstanding conflicting elder patents read in evidence, unless the jury further find that such defendants, in the opinion of the jury, have proved a connection with such elder patent or patents, by purchase, either made by them or others under whom they claim.

The court refused to give either instruction, as asked, but instead thereof gave to the jury the following instruction: —

“ The court instruct the jury, that if they find, from the evidence,

that any of the defendants, or those under whom they claimed, entered upon the parcel of the land in controversy in their possession at the commencement of this action, under a contract, whether it was executed or executory, by parol or in writing, with the agent of Lynch and Blanton, or either of their co-grantees with Clymer, of the 11,000 acres, by the patent read by plaintiff, or any other person claiming under that patent whereby they purchased an individual two thirds, or any other such part, and not the entire interest in such parcel or parcels of the land, then such defendants, or those under whom they claimed, and who had so entered, did not, by their entry into the possession, oust Clymer or his devisees of his * or their undivided third thereof; but the entry of such pur- [* 678] chasers and their possession was for him, Clymer, or his devisees, as well as for themselves; and in the absence of all evidence of notice to Clymer, or those claiming under him, of a subsequent adversary holding by such occupants, their possession did not become adversary, in legal effect, to Clymer or his devisees; and no defendant, who so entered, can now avail himself of the outstanding legal title by the elder patents to be read in evidence; nor can any such defendant prevail in his defence of this action by the length of his possession, and the statute of limitation; nor can any defendant who entered, claiming the entire estate in his parcel of the land, add to the length of his own possession that of any one under whom he claimed and had succeeded, who had so entered under a purchase of an undivided part, and was so a co-tenant with Clymer or his devisees, and thereby make out the twenty years of adversary possession within the statute."

The defendants moved the following instructions, to find as in case of a nonsuit as to all the defendants:—

That the plaintiff has shown title only to an undivided interest in the land, and that only one fifteenth.

To find in favor of all the defendants whose tenements fall within the elder claims of Tuttle and Howard.

To find in favor of all whose possession existed, and continued, and have been held as their own, for twenty years before the commencement of this suit.

To find in favor of those whose possession existed and continued under Lynch and Blanton, and adverse to Clymer, for twenty years before suit brought.

To find in favor of those whose possession originated, and have been held as their own, twenty years before suit brought, under purchases from Lynch and Blanton, or either of them, after the division made under the orders of the Henry county court.

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The court refused to give either of the instructions, as moved by the defendants, but in substitution therefor gave the following instructions:—

“ The court instruct the jury, that their verdict ought to be for each defendant who, or whose predecessor in possession, from whom he had derived his possession and claim of right, had entered on the land in his possession at the commencement of the action, twenty years before that day, by a purchase and claim thereof in severalty, all as his own, and not an undivided part in co-tenancy with Clymer or his devisees, but adversely to him or them, whether such purchase was from Lynch or Taylor, or Lynch and Blanton, or any other who had ever afterwards, up to the commencement of this suit, continued thus to hold such possession.”

Crittenden, for the plaintiff in error.

Tibbatts and Armstrong, contra.

[* 687] * STORY, J., delivered the opinion of the court.

This is the case of a writ of error to the circuit court of the district of Kentucky. The original suit was an ejectment for a certain tract of land, in Kentucky, containing 11,000 acres; and upon the trial, upon the general issue, a verdict was found for the defendants, upon which judgment passed for them. A bill of exceptions was taken by the plaintiff to the opinions of the court, at the trial; and to revise those opinions the present writ of error is brought by the plaintiff.

On the 24th of December, 1806, a patent for the tract of 11,000 acres of land was granted by the commonwealth of Kentucky, unto George Clymer, (under whose will the lessors of the plaintiff make claim,) one third, and unto Charles Lynch and John Blanton, (under whom the defendants make claim,) two thirds. In the year 1810, if not at an earlier period, (for there is some repugnancy in the various dates stated in the record,) Lynch and Blanton procured a partition of the tract to be made, by the authority of the county court of Henry, by certain commissioners, appointed pursuant to the Kentucky statute of 1792, by which one third was assigned in severalty to Clymer, (he being then a non-resident,) by certain metes and bounds; and the remaining two thirds were assigned to Lynch and Blanton, by certain other metes and bounds. The return of the commissioners was filed, acknowledged, and admitted to record in the clerk's office of the county of Henry, in 1810; but the court of that county do not seem to have ordered the return to be received

and recorded until 1827. How this delay took place has not been satisfactorily explained; and the omission has been insisted upon as an objection to the validity of the partition.

All the defendants appear, from the evidence, to have derived title to the lands in their respective occupation, and to have entered into possession of the same, after the partition was made, and by titles in severalty, derived exclusively from or under Lynch and Blanton; and the lands held by them are situate exclusively within the tract assigned by the partition to Lynch and Blanton. The main defence relied upon by the defendants, at the trial, was an adverse possession to the title of Clymer, during the period prescribed by the statute of limitations of Kentucky. To rebut this defence, the plaintiff insisted that the partition was void, and being void, the defendants having entered into the land under the patent to Clymer, Lynch, and Blanton, who still, notwithstanding the partition, in point of law, remained tenants in common of the land, were not at liberty to set up an adverse possession against that title; nor at liberty to set up *any outstanding superior title in any third person, un- [* 688] der any elder patent offered in evidence, to defeat the plaintiff in the action.

The plaintiff, upon the evidence, (which need not be here particularly recited,) moved the court to instruct the jury as follows. [See the statement of the reporter.]

The defendants also moved the court to give certain instructions to the jury; which instructions the court refused to give, but gave the following instruction in substitution thereof. [See statement.]

To the instructions so refused as propounded by the plaintiff, and to the several instructions so given by the court, the plaintiff excepted; and the cause stands before us for consideration upon the validity of these exceptions.

The first point made, at the argument for the plaintiff, is as to the validity of the partition under the proceedings in the county of Henry. In our judgment, it is wholly unnecessary to decide whether those proceedings were absolutely void or not; for, assuming them to have been defective or invalid, still, as they were matter of public notoriety, of which Clymer was bound, at his peril, to take notice; and as Lynch and Blanton, under those proceedings, claimed an exclusive title to the land assigned to them, adversely to Clymer; if the defendants entered under that exclusive title, the possession must be deemed adverse, in point of law, to that of Clymer.

And this leads us to the consideration of the instructions actually given by the court, which cover the whole ground in controversy, and, if correct in point of law, show that the court rightly refused to

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give the instructions asked by the plaintiff, so far as they were not consistent with the instructions actually given. It is very clear that the court are not bound to give instructions in the terms required by either party; but it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case, as presented by the parties.

The first instruction given by the court is as favorable to the plaintiff, in all its bearings, as the law either justifies or requires, and is in direct response to the substance of some of the instructions asked by the plaintiff. It in substance states that if the defendants entered under the title of Clymer, Lynch, and Blanton, as tenants in common, and did not claim any title except to two thirds of the parcels of land respectively held by them, and not to the entirety thereof, then their entry into the possession did not oust either Clymer or his devisees of his or their undivided third part, and was not adverse thereto; and that the defendants so entering could not avail themselves of the defence of the statute of limitations; and they could not avail themselves of the outstanding legal title of third persons by any elder patent. So far as this instruction goes, it is manifest that it was favorable to the plaintiff; and indeed it is not now *per se* objected to, but the objection is, that it does not go far enough, and thus was to the prejudice of the plaintiff.

[* 689] * The real point in controversy turns upon the second instruction given by the court, in answer to the prayer of the defendants. That instruction, in substance, states, that if any of the defendants entered into possession of the lands respectively claimed by them, and held the same for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not for an undivided part thereof, in cotenancy with Clymer or his devisees, but adversely to them, then such defendant was entitled to a verdict in his favor, whether he held by a purchase from Lynch, or Blanton, or any other person who had ever afterwards, up to the commencement of the suit, continued thus to hold the possession. We see no objection to this instruction, which ought to prevail in favor of the plaintiff; on the contrary, we deem it entirely correct, and consonant to the principles of law upon this subject. It is true, that the entry and possession of one tenant in common of and into the land held in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession, by the party so entering into possession, is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other

tenants, and it will afterwards be as operative against them as if the party had entered under an adverse title. Now such a notorious ouster or adverse possession may be by any overt act *in pais*, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, or, as in the present case, of a several and distinct title to the entirety of the whole of the tenant's purparty under a partition, which, in contemplation of law, is known to the other tenants. Upon so familiar a doctrine, it scarcely seems necessary to cite any authorities. So early as *Townsend and Pastor's case*, 4 Leon. 52; it was holden in the common pleas, by all the justices, that where there are two coparceners of a manor, if one enters and makes a feoffment in fee of the whole manor, this feoffment not only passes the moiety of such coparcener, which she might lawfully part with, but also the other moiety of the other coparcener, by disseisin. This decision was fully confirmed and acted on, in the recent case of *Doe d. of Reed v. Taylor*, 5 Barn. & Adolph. 575, where the true distinction was stated, that although the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for the entry generally shall always be taken according to right; yet that any overt act or conveyance, by which the party entering or conveying asserted a title to the entirety, would amount to a disseisin of the other parties, whether joint tenants, or tenants in common, or parceners. Upon the same ground, it was held, in New York, in the case of *Jackson v. Smith*, 13 Johns. 406, that a conveyance made by one tenant in common, of the entire *fee of the land, and an entry and possession by [* 690] the purchaser, under that deed, is an adverse possession to all the other tenants in common. To the same effect is the case of *Bigelow v. Jones*, 10 Pick. 161. The reason of both of these latter cases is precisely the same as in the case of a feoffment, the notoriety of the entry and possession, under an adverse title, to the entirety of the land.

Similar principles have been repeatedly recognized in this court. In *M'Clung v. Ross*, 5 Wheat. 116, 124, the court said: "That one tenant in common may oust another, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." In the case of the *Lessee of Clarke v. Courtney*, 5 Pet. 319, 354, this court also held, that where a person enters into land under a deed or title, his possession (in the absence of all other qualifying or controlling circumstances) is construed to

be coextensive with his deed or title ; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title. This doctrine is strongly applicable to the possession under the partition in the present case. There are several other cases affirming the same doctrine, and especially *Green v. Lister*, 8 Cranch, 229, 230 ; *Barr v. Gratz*, 4 Wheat. 213, 223 ; and *The Society for Propagating the Gospel v. The Town of Pawlet*, 4 Pet. 480, 504, 506. The doctrine has been carried by this court one step further ; but at the same time one which is entirely consistent with the principles on which the general rule, and the exceptions to it, are founded. In *Blight's Lessee v. Rochester*, 7 Wheat. 535, 549, 550, it was held, that in cases of vendor and purchaser, although the latter claimed his title under or through the former, yet as between themselves, the possession of the purchaser under the sale, where it was absolute and unconditional, was adverse to that of the vendor, and he might protect that possession by the purchase of any other title, or by insisting upon the invalidity of the title of the vendor, as the foundation of any suit against him. Now, upon this last ground, the defendants were certainly at full liberty as absolute purchasers in fee to maintain their adverse possession to the land, and the bar of the statute of limitations against Lynch and Blanton, and *à fortiori* against Clymer.

Upon the whole, we are entirely satisfied that the second instruction given by the court was correct in point of law ; and, therefore, the judgment of the circuit court ought to be affirmed, with costs.

ROBERT BROCKETT *et al.*, Appellants, *v.* WILLIAM BROCKETT *et al.*,
Defendants.

3 H. 691.

Though exceptions were taken to the rulings of the circuit court, on the trial of a feigned issue out of chancery, in a case pending in that court, yet this court cannot pass on those exceptions, unless they were adjudicated upon by the circuit court.

If a master's report is not excepted to, as required by the 73d chancery rule, no objection to any of its items can be taken in this court.

THE case is stated in the opinion of the court.

Neale and Bradley, for the appellants.

Jones and Brent, contra.

M'LEAN, J., delivered the opinion of the court.

This is a bill in chancery, brought here by an appeal from the circuit court of the District of Columbia.

The complainants filed their bill, alleging themselves to be the legitimate heirs of Robert Brockett, deceased, and claiming as such one half of the real and personal property of which he died seised and possessed. The defendants filed their answers, denying the allegations of the bill. An issue at law was directed to try the legitimacy of the complainants, and after hearing the evidence, the jury found a verdict in their favor.

Several exceptions were taken to the rulings of the court, in the admission of evidence to the jury, and to the refusal of the court to admit evidence offered by the defendants, which appear in two bills of exceptions. And these decisions, in relation to the trial of the issue, constitute the principal ground of controversy in the case.

It does not appear that any questions were raised on the chancery side of the court, growing out of these exceptions. And this not having been done, it is proper to inquire whether the exceptions can be considered in this court.

It is contended that as the same judges sat in the court of law as in the court of chancery, that it could not be necessary to bring before them as chancellors what they had decided in a court of law. Had the court of law been held by different persons from those who sat as chancellors, it is admitted that it would have been necessary to bring before the latter the points ruled in the trial of the issue. But is not the principle the same in both cases? The capacities in which the same tribunal acts on such occasions, are as distinct as if the same duties had been performed by different tribunals.

* The distinction is the same as where a judgment at law is [* 692] entered by a court which also exercises chancery powers; and which powers are invoked against its own judgment. In such a case it might as well be said, as in the present one, why may not the same court, whether acting at law or in chancery, having possession of the cause, finally decide it.

The bills of exceptions are copied into the record; but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court sitting in chancery. An issue in part is directed by a court of chancery to inform its conscience. To bring the fact or facts before the jury at law, a feigned issue is made by pleadings, as at law; and if the proceedings of the jury be unsatisfactory to the court of chancery, either on account of the admission of incompetent evidence, the exclusion of evidence which is competent, or by a mistake of the facts by the jury, the court of chancery will order another trial of the issue. By the consent of parties these

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issues are sometimes tried without the formality of pleading. But in all cases where objections exist to the verdict, they must be brought before the court of chancery which ordered the issue. And where this is not done in an inferior court, the objections cannot be taken in the appellate court of chancery. It is a general rule of practice, that no point arising on the pleadings or evidence in an appellate court shall be made which was not brought to the notice of the inferior court. And we think in this case, that the exceptions taken on the trial of the issue at law not having been acted on by the court of chancery below, cannot be insisted on in this court.

Being satisfied of the legitimacy and consequent heirship of the complainants, from the verdict of the jury, the court below referred to a master the rents received by the defendants, and other matters of account pertaining to the estate. And to some of the items allowed by the master, objections are made before this court. But it does not appear that these objections were brought before the lower court by exceptions to the master's report. The seventy-third chancery rule is decisive on this subject. It provides that "the parties shall have one month from the time of filing the master's report, to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired." No exceptions having been filed in the circuit court to the report of the master, none can be heard in this court.

The verdict and the report of the master, which constituted the basis of the decree of the court below, not having been objected to in that court, cannot be objected to here, and consequently the decree of the circuit court is affirmed, with costs.

7 H. 220; 8 H. 402.

JOHN McDONOGH, Plaintiff in Error, v. LAURENT MILLAUDON and others, Defendants.

3 H. 693.

The treaty between the United States and France for the acquisition of Louisiana, confirmed titles as they existed under the local law; and the decision of the supreme court of Louisiana, upon a question of boundary, of one of the grants made before the treaty, cannot be considered as denying a title claimed under a treaty, but only as applying that title, whose existence is admitted, to the land; and consequently this court has not jurisdiction under the 25th section of the judiciary act, (1 Stats. at Large, 85.)

And the same view is applicable to a confirmation of a French title by commissioners, under an act of congress, not by specific metes and bounds; they confirmed it as it existed, and it is for the local tribunals to ascertain its bounds.

If the defendant in error appears during two terms, and moves for a *certiorari* to complete the record, he cannot afterwards object that the citation was not regular.

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ERROR to the supreme court of the State of Louisiana, in a suit to try the title to land. The title depended upon the question, whether the plaintiff in error, who claimed under a French grant made to one Dupard, should run diverging or parallel lines back from the River Mississippi. The other facts appear in the opinion of the court.

Jones and Meredith, for the plaintiff. •

Coxe and W. Cost Johnson, contra.

* CATRON, J., delivered the opinion of the court. [* 704]

The question in the supreme court of Louisiana was one of boundary. The court passed on the grant to Dupard only, and not on the opposing claim; if the lines of the former did not open in their production from the Mississippi, towards Lake Maurepas, then the land claimed under Millaudon's title was not embraced by Dupard's grant, and no necessity existed for the examination of Millaudon's. Dupard's was made in 1769, "for thirty arpens of front to the River Mississippi, upon the whole depth that shall be found, unto Lake Maurepas, of the land where heretofore were two villages of the Collapissa savages; to take from the plantation of one Allemand, unto its junction with that of a person named Joseph Lacombe." The front being ascertained, the court below held that the extension back must be on parallel lines. As this construction excluded the land claimed by Millaudon, it ended the controversy in his favor.

Did this final judgment draw in question the construction of a • treaty or statute of the United States; or of an authority exercised * under the same; and was the decision against [* 705] the validity of either; or against the title, or right set up or claimed under either? If these questions are answered in the negative, it follows we have no jurisdiction to reëxamine, or reverse the judgment under the 25th section of the judiciary act; as no other error is within the cognizance of this court.

1. The treaty with France, of 1803,¹ gave no further sanction to the boundary of McDonogh's title than it had by the grant; in respect to its validity, the decision of the state court supported the claim to the same extent that the treaty protected it, and therefore the decision was not opposed to the treaty. A question partly involving this consideration was adjudged in *The City of New Orleans, v. De Armas*, 9 Pet. 225, to which we refer.

2. Was the decision of the supreme court of Louisiana opposed

¹ 8 Stats. at Large, 200.

to any act of congress? Dupard's grant was completed as early as 1769, and presented to the register and receiver as a complete title; was thus reported on by them to the general land-office, and by that department the report was laid before congress; it is as follows:—

“ No. 406.

“ John McDonogh and Company claim a tract of land situated in the county of Acadia, on the east shore of the River Mississippi, sixteen leagues above New Orleans, containing thirty-two arpens front, with a depth extending as far as Lake Maurepas.

“ This tract of land has formerly been claimed before the board of commissioners, and, the depth extending beyond forty acres rejected by them, for want of evidence of title; but the claimant has since produced a complete French title to the whole quantity claimed, in favor of Pierre Delille Dupard, (under whom he claims,) dated 3d day of April, 1769.”

On the report at large, embracing many claims, congress proceeded; and by the act of May 11, 1820,¹ declared, “ that the claims to lands within the eastern district of Louisiana, described by the register and receiver of said district in their report to the commissioner of the general land-office, bearing date the 20th day of November, 1816, and recommended in said report for confirmation, be and the same are hereby confirmed, against any claim on part of the United States.”

McDonogh's claim, No. 406, is of class first, species first, in the report, including twenty-one grants, of which the register and receiver say: “ All the preceding claims, being founded on complete titles, are in our opinion confirmed by law.” 3 Am. State Papers, 255. This is explained in page 267, where it is again said: “ Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on general principles, and therefore require no
[* 706] * confirmation by the government of the United States to give them validity.”

Many incomplete titles were recommended for confirmation, and confirmed by congress, but in these cases the former governments had not parted with the ultimate interest in the land, and the fee was transferred to the United States by the treaty, with the equity attached in the claimant, which equity was clothed with the fee by the confirming act. The perfect title of McDonogh being clothed

¹ 3 Stats. at Large, 573.

with the highest sanction, and in full property, on the change of governments an assumption to confirm it would have been pregnant with suspicion that it required confirmation by this government, in addition to the general law of nations and the treaty of 1803, which secured in full property, such titles. That the grant stands recognized as complete and valid against the United States, and any one claiming under them, by the proceedings had before the register and receiver and by congress, we have no doubt; further than this, the government has not acted on it. In such sense similar titles have been treated, as will be seen by the two acts of May 8, 1822, the first¹ confirming lots in the town of Mobile and claims in West Florida; the second,² sanctioning the reports of the registers and receivers of the land-offices at St. Helena Court House and at Jackson Court House, in the districts east and west of Pearl River; in regard to which reports, congress says: That all complete titles (reported on as such) be, and the same are, recognized as valid and complete against the United States, or any right derived under them.

But in McDonogh's case, as in other similar ones referred to above, the recognition extended only to the boundaries the grants themselves furnished, according to their landmarks, and true construction under the local laws in virtue of which they were obtained.

3. To overcome this objection, it is insisted, on the part of the plaintiff in error, that McDonogh and Company filed plans of survey and descriptions of the land with the register and receiver, and especially that of F. V. Potier, as part of their title, giving the boundaries as they were claimed before the supreme court of Louisiana; that these were confirmed by congress; that the confirmation, to the extent it was made, is binding on the United States, as the opposing claim of Millaudon was not drawn in controversy below, and the lands claimed treated as unappropriated, by individuals.

If the fact assumed was true, that the plans and descriptions had been confirmed, and boundary given to the title according to them by the United States, then the decision would be opposed to the confirmation, and jurisdiction exist in this court.

There can be no doubt such plans and descriptions were filed and recorded in due time; but no evidence is found in the record that the register and receiver acted on them, or that they were presented to congress even as documents accompanying the report; if they were, it is manifest that they were disregarded, for two reasons;

* first, because congress did not assume the power to deal [* 707] directly with this title at all; and, secondly, because the

¹ 3 Stats. at Large, 699.

² Ib. 707.

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report had reference singly to the face of the grant, regardless of private surveys made subsequent to its date, at the instance of the successive owners.

The state court held McDonogh's title to be valid to every extent that it has been recognized by the United States, and only applied the local laws of Louisiana in its construction, so far as they had a controlling influence on the manner in which the side lines should be extended from the Mississippi River towards Lake Maurepas; and as, in so doing, neither the treaty of 1803, nor any act of congress, or authority exercised under the United States, was drawn in question, this court has no jurisdiction to revise the decision of that court; for which reason, the cause must be dismissed.

The clerk of the supreme court of Louisiana issued the writ of error, and one of the judges of that court signed the citation; and on the ground that such writ could not remove the record, it was moved on a former day of the term to dismiss the cause. It has been here for two terms; a writ of *certiorari* has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late. If errors had been assigned by the plaintiff here, and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the supreme court of Louisiana had no authority to issue the writ, on which we at present express no opinion.

7 H. 586; 9 H. 421; 13 H. 150; 15 H. 81; 20 H. 208, 522; 4 Wal. 204.

LESSEE OF DANIEL W. GANTLY *et. al.*, Plaintiff, v. WILLIAM G.
and GEORGE W. EWING, Defendants.

3 H. 707.

Under the 3d section of the act of Indiana, of February 4, 1841, the sheriff had not power to sell the fee on execution, without first offering the rents and profits for sale; and the purchaser was bound to take notice of his omission to do so.

As to existing mortgages, foreclosable by a sale, the legislature could not prohibit the sale for less than half the appraised value of the land, because such a law impairs the obligation of a contract.

CERTIFICATE of division of opinion by the judges of the circuit court of the United States for the district of Indiana. The parties agreed on the following facts.

[*708] "On the twenty-fifth day of December, eighteen hundred and thirty-eight, one Jacob Linzee was indebted to Daniel

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W. Gantly, of the city of New York, in the sum of \$909.82; and to secure the payment of the same, Linzee then executed to Gantly a mortgage on town lot numbered one hundred and seventy-nine, in Peru, Indiana, of which Linzee was seised in fee. At the time of the execution of the mortgage, Linzee was in possession of the mortgage premises, and they were worth from one thousand to fourteen hundred dollars. Linzee made default in the payment, and Gantly, on the 8th day of September, eighteen hundred and forty, obtained a decree in the state court to foreclose the mortgage; and unless the money should be paid in sixty days, an execution was directed to be issued for the sale of the premises.

“ In January, eighteen hundred and forty-one, an execution was issued, and on the 13th of February following, before the sale of the property, the appraisement law passed, and was published the 23d day of February, eighteen hundred and forty-one; on the 1st of March, eighteen hundred and forty-one, the sheriff, having given due notice, sold the premises at public auction, to the defendants, for \$76, and executed a deed to them for the same; which deed was offered in evidence to support the title of the defendants. The property was not valued, nor were the rents and profits offered for sale by the sheriff. And the court were asked to instruct the jury that, as the rents and profits had not been offered, nor the land valued, under the statutes of Indiana, the sheriff's deed was inoperative and void. And, on this question, the opinions of the judges were opposed; and on motion of plaintiff's counsel, the point is certified to the supreme court, under the act of congress.”

Cooper and White, for plaintiffs in error.

Hoban, for defendants in error.

* CATRON, J., delivered the opinion of the court. [*713]

This case comes before us on a certificate of division from the circuit court for the district of Indiana. As the facts fully appear in the statement of the reporter, they need not be repeated at large here. The action was an ejectment; the defendants set up a sheriff's deed, and the court was asked to instruct the jury that the deed was void for two reasons: First, because the rents and profits had not been offered for sale, before the fee-simple was sold: Second, nor had the land been valued under the statutes of Indiana before the sale was made.

The first ground of objection involves the construction of the 3d section of the act of February 4, 1831, which is in the following words: —

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"That real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have first been offered for sale at public auction and outcry; and if such rents and profits will bring a sum sufficient to satisfy the execution or executions levied thereon, the sheriff, or other officer selling the same, shall make to the purchaser thereof a deed conveying to such purchaser a term of seven years in and to such real estate; and moreover forthwith deliver immediate and actual possession thereof; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple, or other estate of the execution defendant or defendants, shall be sold, and a deed conveying the same to the purchaser thereof, shall be executed by the officer selling the same."

By this provision, the sheriff was governed in making [*714] the sale; if *it was merely directory to the officer, then the deed cannot be assailed; but if it contains an inhibition to sell the fee, until the rents and profits are first offered, and the authority to sell the fee in this instance did not exist before, then the sale was void; as it is admitted on the record that the rents and profits were not offered by the sheriff. Had this fact not been established, then we are of opinion the court would have been bound to presume the sheriff did his duty, and that the sale and deed founded on it, were valid; they being *prima facie* valid, the proof to assail them must come from the opposing side, be it negative or affirmative. This is the general rule applicable to all proceedings of courts where they have and exercise general jurisdiction; and of this description is the court of Indiana, from which the execution issued. This being conceded, the question is, does the established fact annul the sale? At common law, the fee in lands by a *fiери facias* is not subject to sale; the sheriff's authority to sell in this country is in the nature of a naked power conferred by statute; he takes no title in the land by the levy, as he does in goods, and can confer none on the purchaser, if power to sell is wanting. We admit, if the words of a law are doubtful, the sale should be supported, and the benefit of any obscurity in the statute be given to the purchaser, lest he should be misled in cases where a general power is given to the sheriff to sell, and this is limited by indefinite restrictions; and that the safer rule is to hold such restrictions to be directory. Further than this, no general rule need be asserted. Giving the act in question the benefit of these favorable intendments, and what authority did it confer on the sheriff?

The general power to sell lands at auction and outcry is given, but then follows the explicit restriction that the fee-simple shall not be sold until the rents and profits shall have been first offered at public auction and outcry; if they bring the amount of the execution, the sheriff is to convey to the purchaser the term of seven years, and put him forthwith into possession. Had the power to sell stopped here, then no authority to convey the fee could exist; and the question is, when did the power arise? We think, on the failure of the sheriff to get a bid of the whole amount of the levy for a term of seven years; as before, the fee could not be sold. Nor can we see how the legislature could have made the exception more explicit, unless negative language had been used, repeating the inhibition; and for this there was no necessity, as the statute conferred a power not known to the common law, and which could only be given affirmatively, and which was not given at all, save with the positive restriction imposed in advance.

To treat the exception as directory to the sheriff would violate, as it seems to us, the general spirit of the laws of Indiana; they cautiously endeavor to maintain debtors in possession and to preserve their houses, at the same time that a remedy is afforded to creditors *against lands. It not being our province, how- [*715] ever, to construe the state laws on this point, so as to give any binding effect to the adjudication on the courts of Indiana, we forbear to go into an examination in detail of what we suppose to be the policy of that State.

One consideration has been much pressed on us, to wit: That the purchasers here are not proved to have had notice of a failure on the part of the sheriff to offer the term of seven years for sale first. It is admitted if such notice had been proved, the sale would be void.

In our opinion, the purchaser must be held to notice. The statute contemplates a sale of the term; or an offer to sell it, and a failure; and this at public outcry, at the same time and place, and immediately preceding the sale of the fee. He who goes to purchase and is present at the sale, and does purchase, rarely if ever can want actual knowledge, as the open outcry and public auction of the term is to be as notorious as that by which the fee is sold; and even should the purchaser of the latter not be present at the opening of the vendue, the slightest diligence would command information whether the requisite previous step had been taken. To treat a bidder at the sale in any of its stages, as an innocent purchaser, we think would be dealing with him in a manner too indulgent; as it is quite certain in no other instance could the doctrine of innocent purchaser be applied to one having equal opportunities of knowledge,

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aside from any duty imposed on him to acquire it. Furthermore, this would, in almost every case of the kind, narrow down the issue to a single point, whether the purchaser had or had not notice; leaving the jury to determine on the validity of the title, by the exercise of an undefined discretion; its verdict being founded on an exception *in pais*, and on one the legislature did not see proper to make. This is a question of power, and the answer to the suggestion rests on this. The sheriff's duties are plainly prescribed; if he has no power to sell, want of knowledge on part of the purchaser could not confer it, and no such contingency can be let in to help his deed.

It is insisted the question has been settled by the supreme court of judicature of Indiana, in the case of Doe v. Smith, 4 Blackford, 228, that the purchaser at execution sale takes a good title to the fee, although the land had not been previously offered for sale by the sheriff for the rents and profits of a term of seven years.

That case does not so settle the point as to satisfy us. It applies to a sale, made pursuant to the act of January 30, 1824, § 3; it is in substance like that set forth above, of 1831, but much less stringent and precise in its terms of exclusion, so that the first might be held directory to the officer, and the last an inhibition, if the decision was to the precise effect contended for, which it is not. For another reason we suppose the question not to be settled in Indiana. The certificate of division, although not exclusively contrary to the

assumption that the question has been settled, must still be [*716] treated *by us as assuming *prima facie*, that the construction of the statute is open, and that it requires settlement here for the purposes of the case, as to no other end could the question be brought here in its present form.

It is proper to remark that it would be our duty on this point to follow the construction of the supreme judicial court of Indiana, had it settled any; and this we would the more cheerfully do from the confidence we have in that tribunal; but nothing can be deemed as settled by the court of last resort in a State, unless it has adjudged the direct question; or unless the subject has, in an indirect form, and at various times, been brought before such court and treated as conclusively settled, and not open to controversy. This not appearing to be the case, it is certified to the circuit court that the sheriff's deed is void for the reasons stated.

2. The next question certified is, whether the sheriff's deed is void, because the land was not valued according to the statute of Indiana before the sale took place.

Linzee owed Gantly, who took a mortgage on a town lot, of

which Linzee was seised in fee. This occurred in 1838. The debt was for \$909, and the property mortgaged worth more than the debt. Linzee made default, and Gantly filed his bill to foreclose. In September, 1840, he obtained a decree of foreclosure, on which an execution issued in January, 1841. On the 13th of February following, the appraisement law was passed. The sheriff sold the property on the 1st of March, 1841, to the defendants.

1. The act of 13th February provides that the debtor may redeem real estate sold under execution founded on a judgment or decree, at any time within twelve months from the day of sale, by paying the money into the clerk's office, with interest thereon, at the rate of twelve and a half per cent.

2. That junior incumbrances may redeem in like manner.

3. That, if the judgment debtor neglected, or was unable to take the stay by the laws then in force, the property should be sold on a credit, equal to the stay, and bond be taken by the officer selling, for the purchase-money.

4. That thereafter no property should be sold on execution for less than one half of its cash value at the time of the sale, to be ascertained by three freeholders at the instance of the officer; and if the property did not sell for half the value, the fact was to be returned on the execution, and another might issue subject to the same conditions.

The decree ordering foreclosure was made in conformity to the existing laws, at the date of the mortgage, and of the decree. An execution sale was the appropriate mode of foreclosure, and this without any of the restrictions contained in the act of February 13, 1841. The decree followed the provisions of the 18th section of the act of 1831, c. 36. The contract of mortgage was a vested interest, *and its main incident a right to have the land [*717] applied in discharge of the debt, either by an execution executed, as on a judgment at law, or in some form of remedy substantially equal. The new remedy, prescribed by the act of 1841, changed the contract, and required among other things that the mortgaged premises should not be sold to satisfy the debt unless they were first valued, and one half of that value was bid for them. If the legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all; thereby impairing, or defeating the obligation under the disguise of regulating the remedy. This court held in *Bronson v. Kinzie*, 1 How. 319, that the right and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State

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where it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail; as an act directly prohibited could not be done indirectly. This being the settled doctrine of the court, and applying as forcibly to the case before us, as it did to the one cited, we answer to the second ground of objection, that the sheriff's deed is not void on this ground, although no valuation of the property was made before the sale.

6 H. 14; 24 H. 461.

WILLIAM H. M'FARLAND v. WILLIAM M. GWIN, (late Marshal.)
3 H. 717.

Griffin *et al.* v. Thompson, 2 How. 244, reviewed and affirmed.

Though a marshal be out of office, he must complete a levy which he has begun, and is subject to all legal remedies in favor of the execution creditor.¹

THE case is stated in the opinion of the court.

Coxe, for the plaintiff in error.

Walker, for the defendant in error.

[*719] * M'KINLEY, J., delivered the opinion of the court.

M'Farland recovered judgment against Ellis P. Passmore, for the sum of \$9,763.10, in the circuit court of the United States, for the southern district of Mississippi; and on the 6th day of July, 1839, a *fiery facias* issued thereon, directed to the marshal of the southern district of Mississippi, commanding him that of the goods and chattels, lands, and tenements of the said Ellis P. Passmore, he should cause to be made the said sum of \$9,763.10; upon which *fiery facias* the marshal returned, that he had levied of the goods and chattels, lands, and tenements of the defendant sufficient to satisfy the *fiery facias*, but which property had not been sold for want of time.

And thereupon a *venditioni exponas* issued to the marshal, commanding him to expose to sale the goods and chattels, lands, and tenements levied on; upon which he returned that he had sold the property levied on, and received the full amount of the *fiery facias*, in the post notes of the Mississippi Union Bank. The attorney for

¹ Section 28, of the judiciary act of 1789, (1 Stats. at Large, 87.)

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the plaintiff received of the marshal \$514.15, being the amount of the attorney's fees; for which he gave a receipt, but refused to receive any part of the notes for the plaintiff. At the November term, 1841, of the circuit court, the plaintiff moved the court for judgment against the marshal for the amount of the *fieri facias* and interest thereon. On the trial of the motion, it was proved by the plaintiff that the money was demanded on the 22d day of May, 1840; and at that date the post notes of the Union Bank were selling at a discount of 40 per cent. Gwin, the defendant, proved that on the demand made, he had tendered the post notes of the Union Bank, which were refused by the attorney of the plaintiff; and that from August, 1838, when the Mississippi Union Bank went into operation, until about the middle of February, 1840, the post notes of that bank constituted nearly the entire circulating medium of the State; that they had been treated as cash in all business transactions during that time, and had been received by the marshal and the sheriffs of the State in payment of executions. And *there- [*720] upon the court rendered judgment against the plaintiff, and for the defendant.

To reverse this judgment the plaintiff has prosecuted this writ of error.

This question is fully settled in the case of Griffin and Ervin v. Thompson, 2 How. 244. In that case, this court held that the marshal was not authorized by law to receive any thing in discharge of the execution but the gold or silver coin of the United States. To this general proposition we give our full assent; but we do not mean to say there is no exception to this general rule. If the plaintiff were to authorize the marshal to take bank-notes, of any description, in payment of the execution, we have no hesitation in saying, a payment by the defendant to the marshal in such bank-notes would be a satisfaction of the judgment.

But as Gwin failed to prove any such authority from the plaintiff, he was clearly liable for the whole amount of the execution, with legal interest thereon, except the amount paid to the plaintiff's attorney. It has been contended, however, in this case, that, at the time this motion was made, Gwin was not marshal, his time having expired, and another having been appointed in his stead. It is a well-settled principle of law, that if an execution come to the hands of a sheriff to be executed, and his term of office expire before he executes it, he is bound nevertheless to complete the execution; and the same rule applies to a marshal. An execution is never completed until the money is made and paid over to the plaintiff, if it be practicable to make it

All the remedies against the marshal, necessary to compel him to pay over the money he has made, survive his term of service, and remain in full force against him until the execution shall be completed. The judgment of the circuit court must, therefore, be reversed.

NEIL, MOORE, AND COMPANY, Plaintiffs in Error, v. THE STATE OF OHIO, Defendant.

3 H. 720.

The act of the legislature of Ohio, imposing a toll upon passengers in mail stage-coaches, over the Cumberland road, to the exclusion of all other passengers, does in effect exact a toll of mail coaches, and thus imposes upon the United States a part of the burden of supporting the Cumberland road, contrary to the compact between the State and the United States under which the State took the road.

ERROR to the supreme court of the State of Ohio, in an action against the plaintiffs in error to recover tolls. The judgment of that court was for the plaintiffs, consequently denying the validity of the exemption set up by the defendants, who are plaintiffs in error, under the compact and act of congress mentioned in the opinion of the court.

Ewing, for the plaintiff.

Swayne, contra.

[* 740] * TANEY, C. J., delivered the opinion of the court.

This case has arisen out of two acts of assembly, passed by the legislature of Ohio, one in 1837, and the other in 1838, and an order of the board of public works of that State, whereby a toll has been imposed upon passengers travelling in the mail stage on the Cumberland road.

We have already, at the present term, fully expressed the opinion of this court, in relation to the compacts between the United States and the States of Ohio, Pennsylvania, Maryland, and Virginia, concerning this road, and the rules by which they ought to be interpreted. It is only necessary, therefore, on this occasion, to apply the principles there stated to the case before us.

The material parts of the laws in question are the 4th section of the act of 1837, and the 24th section of the act of 1838. The first imposes a toll of three cents on every passenger in the mail stage, at each toll-gate; and the second authorizes the board of public works to revise and modify the rates of toll to be paid by persons using the road; and in pursuance of this authority, the board passed an order

raising the toll on each passenger in the mail stage to ten cents. But no toll is charged, either by the law or the order of the board, upon persons travelling in any other carriage.

The 4th section of the act of 1831, whereby the State of Ohio proposed, with the assent of congress, to take charge of the road and keep it in repair, contains a specific enumeration of the tolls she intended to charge upon carriages of every description, and other property; and after making this enumeration, the section concludes with the following proviso: "That no toll should be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms, or military stores belonging to the same or to any of the States comprising this Union, or any person or persons on duty *in the military service of the United States, or of the [* 741] militia of any of the States."

We shall hereafter speak of the 15th section of this act, which has been supposed to justify the toll in question. But, subject to the modifications, if any, authorized by that section, the entire contract in relation to the tolls, offered by the State and accepted by congress, is to be found in the 4th; the residue of the act containing nothing more than detailed regulations for the collection and application of the tolls.

At the time this compact was made, it was well known that the mail was always transported by contractors, and that whenever it was conveyed in carriages, the vehicles belonged to them, and were their own private property, and not the property of the United States. It was equally well known that upon this road, as well as many others, the postmaster-general, in his contracts, uniformly required that the mail should be carried in a stage or coach capable of accommodating a certain number of passengers, the presence of the passengers being regarded as adding to the safety of the mail, and superseding the necessity of any other guard.

This mode of transporting the mail must have been perfectly known to the State in 1831, when the agreement was made; and in providing for the exemption of carriages conveying the United States mail, both parties must have intended to exempt the vehicles usually employed in that service; and that carriages belonging to the contractors, although carrying passengers, were to pay no toll, while all other vehicles were to be charged at the rate specified in the law. The reason of this exemption is evident; for a toll charged upon the carriages of the contractor would, in effect, be a charge upon the post-office department, since the contractor would be obliged to make pro-

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vision for this expense when bidding for the contract, and regulate his bill so as to cover it.

In the proposition made by Ohio, nothing was said of a toll on the passengers in a carriage of any kind, but the charge is made upon the carriage itself, according to its description, and the number of horses, without any regard to the number of persons that may be travelling in it; and it is evident that it was at that time supposed that the rates specified and agreed on would prove sufficient to keep the road in repair, and that the United States would always thereafter have the free use of it, for mail-carriages of the usual kind, without any burden upon them, direct or indirect.

If the expectations of the parties had been realized, and the tolls mentioned in the law had produced revenue enough to preserve the road, no one, we think, would have supposed that tolls could be collected from passengers in the mail stage, or that the specified charges upon the carriages could have been reduced, and the deficiency supplied by a toll upon persons travelling in the carriages which conveyed the mail.

[* 742 | * In the case of *Searight v. Stokes et al.* 3 How. 151, we have already said that, with an agreement like this before us between the United States and a State, we must look at the relation in which the parties stood to one another, as well as to the subject-matter of the contract, and the object which the high contracting parties intended to attain; and we must expound it upon principles of justice, so as to accomplish the purposes for which it was made, and not defeat their manifest intention, by a narrow and literal interpretation of its words. And regarding it in this point of view, we think it very clear that no part of the burden of supporting this road was intended to be levied upon the United States, but was to be obtained altogether from other sources; and that the relative position and privileges of the mail-coaches in regard to tolls, as prescribed in the law, were to be always afterwards maintained, unless a deficiency or superabundance of revenue should render it necessary to increase or diminish the rates fixed in the law. For if this were not the case, the whole detailed and particular provision in relation to the things to be charged, and the rates to be imposed, as set forth in the law of Ohio, and so cautiously recited in the act of congress¹ consenting to the surrender of the road, would be nugatory and without an object. On the other hand, this mode of proceeding was the natural and proper one, where two sovereignties were contracting with each other by means of legislative action; and it was obviously

¹ 4 Stats. at Large, 483.

adopted by the parties in this instance in order to show the terms proffered by Ohio, and assented to by congress, and forms the conditions of the compact between them, so far as their respective rights were concerned.

We proceed to apply these principles to the question before us. The law of the State, and the order of its board of public works, impose a toll upon every one travelling in the mail stage, while the passengers in every other vehicle are allowed to go free. If this can be done, it is manifest that the United States will derive no benefit from the compact, and so far from enjoying the privilege for which they stipulated, and for which they paid so heavily in the construction of the road, a large portion of the burden of repairs will be thrown upon them. This is strikingly illustrated by comparing the toll charged upon coaches similar to those employed in conveying the mails, with the toll indirectly levied upon the mail stage, by a charge upon its passengers. According to the rates contained in the law of which we are speaking, a four-wheel carriage, drawn by four horses, pays at each gate thirty-one and a quarter cents, and if it is not conveying the mail, it pays nothing on its passengers. This sum is, therefore, the whole amount of the toll to which it is liable. Now the mails on this road have, we understand, been always transported in coaches of the above description; and although under the order of the board of public works no toll is charged directly upon the carriage, yet every passenger must pay ten cents at each *gate, so that the carriage of a mail-contractor, containing [* 743] six passengers, pays nearly double as much as a like carriage owned by any one else with the same number. And what still more strongly marks the disadvantages to which the United States are subjected by this order of the board, these passengers may be persons in the service of the United States, passing along the road in the execution of some public duty, for the order makes no exceptions in their favor. And although this toll, in form, is laid upon the passengers and not upon the vehicle, the result is the same; for in either case it is, in effect, a charge upon the proprietor of the carriage, diminishing his profits in that portion of his business; and when thus levelled exclusively at passengers in the mail stage, it accomplishes indirectly what evidently cannot be done directly by a toll upon the carriage, and in its consequences must seriously affect the interests of the United States. For in bidding for a contract upon a road so much travelled as this, the bidder would undoubtedly be greatly influenced by the advantages which a contract would give him in the conveyance of passengers, as his carriages, when carrying the mail, are entitled to go free. But if they, and they alone, are to be sub-

jected to this burdensome and unequal toll, it is obvious that he must seek to reimburse himself, by enlarging his demand upon the government. Indeed, if this system of levying toll can be sustained, the mischief may not stop here; and it will be in the power of any one of the States through which the road passes so to graduate the tolls as to drive all passengers from the mail stages into other lines, and by that means compel the United States, contrary to their wishes, and contrary to the public interest, to transport the mails in vehicles in which no passenger would travel.

Nevertheless, we do not mean to deny the right of the State to impose a toll upon passengers in the mail stages, provided the power is exercised in a manner and upon principles consistent with the spirit and meaning of the agreement by which the road was transferred to the care of the States. On the contrary, in the case of *Searight v. Stokes et al.*, we have already said that such a toll may be lawfully collected. But as no toll on passengers had been proposed by the law of Pennsylvania, the opinion, on that occasion, is expressed in general terms, as to the right; the case then under consideration not calling upon the court to speak more particularly upon the subject. The Ohio law, however, brings the question directly before us, and makes it necessary to state more fully and precisely the opinion of the court.

The true meaning of the compact we understand to be this. The carriages carrying the mail, with their passengers, travelling in the known and customary manner, were to pass toll free, as well as other vehicles laden with the property of the United States and the persons employed in their service, as mentioned in the proviso hereinbefore recited; and the road was to be kept in repair by the [* 744] *revenue derived from the tolls specified in the Ohio law, according to the rates there set forth, provided they should prove to be sufficient for the purpose. No toll was at that time proposed upon passengers in any vehicle, and passengers in the mail stage, therefore, had no peculiar privilege in going free, and merely passed along the road upon the same terms with those who were travelling in other carriages. And as the compact contains no stipulation for the exemption of travellers in the mail stages, the general government can demand no advantages in their behalf, which are not extended to passengers in other vehicles. But they have a right to insist that the equality upon this subject, which the law of Ohio originally proposed, shall still be maintained; that the privilege and advantages intended to be secured to the carriages conveying the mail, over those granted to other vehicles, shall be preserved in substance and reality as well as in form; and that the passengers in the

mail stages shall not be selected and set apart, as the especial objects upon which burdens are to be laid, and to which travellers in other carriages are not to be subjected.

If, therefore, the revenue from the road, according to the rates originally agreed on, was found to be inadequate, then the State had undoubtedly a right to increase the rate on any thing before subject to toll; or might, if it was deemed more advisable, leave the tolls as they stood, and charge in addition to them a toll on passengers. And if, instead of selecting the persons travelling in the mail coaches, and laying the burden exclusively upon them, all passengers in vehicles of any kind had been equally charged, the real and substantial advantages and privileges to which the United States are entitled under the agreement would have been preserved, and the equality in relation to passengers originally existing between the mail coaches and other carriages would not have been disturbed. And it is in this manner only, in our judgment, and as a toll in addition to that specifically stated in the contract, and imposed equally upon passengers in every description of vehicle, that persons travelling in the mail stages can be lawfully charged, without first obtaining the assent of congress.

The 15th section of the law of 1831 has been relied on in the argument, as reserving to the State the right to make any alteration it might afterwards think proper without regard to the interest of the general government. It is true that this section begins with a declaration that it shall be lawful for the general assembly, at any future session, without the assent of congress, to change, alter, or amend the act. But this clause evidently relates to the various provisions made in the law for the collection and disbursement of the money arising from the tolls proposed to be charged. The United States could have no interest in these details, and they were, therefore, properly retained in the hands of the State. And so in regard to the privilege of passing free on certain occasions, given by the law, it is undoubtedly in the power of the State, if it [* 745] thinks proper, to revoke it, since the exemption was a mere voluntary act, founded on no valuable consideration, but growing out of what was then supposed to be a just and liberal policy, which the State could afford to exercise; but which it had the right to change whenever it was deemed necessary to do so. But a full and valuable consideration had been paid by the United States for the privileges reserved to them, and they were a part of the contract which transferred the road to the care of the State. And this being the case, the section in question cannot by any sound rule of construction be regarded as inconsistent with the contract contained in another part

of the same law, and as placing the rights secured to one party entirely at the discretion and the control of the other. The reservations of power to the State, evidently relate to subjects in which the general government had no separate interest; and they would have been altogether unnecessary and useless if the State had not considered the preceding part of the law as the proffer of a compact which was to be obligatory upon it, if assented to by congress.

There is a clause in the law of 1837, which would appear to distinguish between the mail stages, in relation to toll, where more than one mail passed along the road on the same day. Upon this point it may be proper to say, that, in the opinion of the court, it rests altogether in the discretion of the postmaster-general, where the power has been conferred on him by congress, to determine at what hours the mail shall leave particular places and arrive at others; and to determine whether it shall leave the same place only once a day or more frequently. Upon this point his decision is absolute, when the discretion is committed to him by the laws of the United States, and cannot be controlled by a State or by the courts. And in the case of *Searight v. Stokes and others*, 3 How. 151, when the court speak of abuses by the contractors in the number of carriages employed, and of the right of the court to enforce the compact, it will be seen by a reference to the opinion, that it is confined to cases where the mail-bags, directed to leave the post-office at the same time, are unnecessarily divided among a number of carriages in order to evade the payment of toll; and the opinion expressed on that occasion by the court does not apply to stages leaving the post-office with mails at different hours, in obedience to the orders of the department. In the latter case it is immaterial whether the mails are light or heavy. The postmaster-general is, upon this subject, the proper and only judge of what the public interest and convenience requires, and his decision cannot be questioned by the courts.

The provision upon this subject, however, appears to have been intended to guard against abuses by contractors, rather than to interfere with the powers of the postmaster-general. And in regard to the toll imposed, as hereinbefore mentioned, if it is necessary for the

support of the road, it is in the power of the parties to the [* 746] compact * to modify it at their pleasure, and to give the

State the power it has exercised. But according to the terms of the contract, as it was originally made, and still stands, the toll upon passengers in the mail stages, laid in the manner hereinbefore stated, cannot lawfully be demanded, and the judgment of the state court must therefore be reversed.

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DANIEL, J. From the decision just pronounced on behalf of the majority of the court, I am constrained to dissent. Upon the principles involved in the decision, so far as they have been assumed as the foundation of rights in the federal government, or in the postmaster-general as its agent or representative, independently of any agreement with the State of Ohio, my opinion has already been declared. That opinion was expressed on a similar point arising in the case of *Searight v. Stokes et al.*, during the present term; it is unnecessary, therefore, on this occasion, to repeat it. With respect to the compact which is said to have been made between the federal government and the State of Ohio, by the act of congress relinquishing the control of the Cumberland road to the State, and by the act of the Ohio legislature, assuming the control and management of that road, it has not to my mind been shown that this compact has in any respect been violated by the State. A cursory view of the legislation, both by the State and by congress, will establish the very converse of any such inference. That the several proceedings on the part of the State steer entirely clear of collision with the letter of that compact, has not, so far as I have heard, been even disputed. The statute of Ohio, passed on the 4th of February, 1831, after several provisions—1, Investing the governor of the State with power to take under his care that portion of the Cumberland road comprised within the limits of the State; 2, Prescribing the rates of toll to be collected; 3, Laying down regulations for the police of the road; contains in the second proviso of the 4th section the following enactment: “Provided, also, that no toll shall be received or collected for the passage of any stage or coach carrying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same, or to any of the States of the Union; or any person or persons on duty in the military service of the United States, &c., &c.” The 15th section of the same law is in the following words: “That it shall be lawful for the general assembly at any future session thereof, without the assent of congress, to change, alter, or amend this act; provided that the same shall not be so changed, altered, or amended, as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll-houses * thereon, and for the payment of the fees or [* 747] salaries of the superintendent, the collectors of tolls, and such other agents as may be necessarily employed in the preservation and repair of the same, according to the true intent and mean-

ing of the act." The act of congress of the 2d of March, 1831, 4 Story, L. U. S. p. 2250, is nothing more than a literal recital of the law of Ohio, and an entire and unqualified assent to, and adoption of that law. These statutes comprise all that has been ever done by the State and federal governments, which amounts to any thing in the nature of an agreement or compact between them in reference to the Cumberland road. Let us now inquire what it is that, by reasonable and proper construction, these laws import? And it should, in their examination, ever be borne in mind, that whatsoever the law of Ohio has ordained in reference to its subject-matter; whatever rights or powers it has claimed for the State in regard to it, the act of congress has unconditionally recognized the whole. The second proviso of the 4th section, already quoted, contains no stipulation that ordinary travellers or passengers, or any others indeed, or any descriptions of property, save those expressly enumerated in the proviso, shall pass upon the road free of toll. It concedes to the federal government that stages carrying the mail, i. e. the carriages and the horses necessary for their use, and the mail itself, should not pay toll; but with respect to private travellers, and to every thing within or without those carriages, the law is entirely silent. By what correct implication, then, can the power of the State to levy tolls on travellers in such carriages be taken away. I can conceive of no implication tending to such a result, which would not obviously do violence to the language of the statute, as it would to every correct rule of construction, and to every intendment consistent with the natural and plain objects of the law. The fact that the State has exacted tolls on passengers in the stages carrying the mails, only beyond a certain number of carriages so employed, can by no correct reasoning affect the right of the State in this matter, however it might be received as a measure either of policy or liberality; for having the power absolutely to exact tolls of all travellers on the road not exempted by the proviso, this power carried with it, by every sound rule of logic, the right to discriminate between the subjects of her power. She had then a perfect right to declare that travellers in specified carriages carrying the mail should pass free of toll, and that those transported in other vehicles although bearing the mail, likewise should be subjected to the payment of toll. Such a regulation the State had the power to enact, had it been the dictate of mere caprice. A correct apprehension, however, of her policy and interests in reference to this road, and in reference to the accommodation of the public, will develop a more enlarged and more equitable motive for the measures adopted by the State, [*748] showing those measures to have been produced * by the

force of supervening circumstances. It cannot be denied, that in assuming the management of this road, the purpose of the State was to maintain and preserve it as a commodious highway. By the title of the law passed for its assumption, namely, "An act for the preservation and repair of the United States road," as well as by every clause and provision of that law, this object is clearly evinced. It is equally undeniable, that the means in contemplation for the accomplishment of this object were the usual and natural means by which artificial highways are supported, viz: the tolls collectable on travellers and on property transported upon it. The concession to the federal government of the free passage of a portion of its mails over this road, and of the vehicles in which they might be carried, was an act of fairness and liberality which should not be made the pretext for abuse and monopoly, such as must, if permitted, dry up the source whence the means of maintaining the road are to be derived, and which would operate for the exclusive advantage of the favorites of such monopoly, and for the serious injury of the public. To guard against consequences like these, the power reserved by the 15th section of the law of 1831 was retained by the State, a power expressly recognized to its full extent by the act of congress adopting the former law; and it can as little be doubted, that, in the practical experience of those consequences, and in the intention of applying a remedy for them, the law of Ohio of March 9, 1838, and the order of the board of public works of the same State, had their origin.

But it is argued that the exaction of tolls on travellers in stages carrying the mails, would be a violation of the compact between the two governments, because it would enhance the demands of contractors for transporting the mail, and thereby become a tax upon the federal treasury, and in the same degree an impediment to the conveyance of the mails. It is a sufficient reply to such an argument to remark, that neither the law of Ohio nor the act of congress adopting that law, stipulates any exemption from tolls on travellers, but the exemption is limited to carriages only; and it is an inflexible rule of contract, too familiar to be commented on here, that neither party, singly, can superadd a term or condition to a contract completed. This argument is therefore utterly without force, even if the effects it seeks to deduce could be demonstrated. It is fallacious too in another respect. The monopoly in support of which it is adduced, by enabling the mail contractor to drive off all competition, whilst it puts it in his power to withhold the tolls by payment of which the road would be supported, enables him to practise the very extortions upon the government which fair competition would be the surest means of preventing. But conceding, for the moment,

that a denial to the contractor of the privilege now contended for, might enhance the price of transporting the mails, the question still very properly arises, whether this effect * (were the language of the law even doubtful) would justify the extension to him of such a privilege? A just view of the legislation of both the state and federal governments, and of the obvious purposes of that legislation, must compel a negative answer to this question. The purposes designed by this legislation were the preservation and repair of the national road. Such are the objects announced, not only in the titles of the laws themselves, but provided for in all their enacting sections; and the *quo modo* declared by these enactments is the levying of tolls. Is it then reasonable or logical, or rather is it not inconsistent and contradictory, to attempt to deduce from them conclusions which fall not within their terms, but which go to defeat every end which must have been within the contemplation of the parties; for which indeed these enactments all profess to have been made. Is not this attempt in violation of all rules for the construction either of statutes or contracts, which always preserve the main and obvious intentions of legislators or of contracting parties, to the exclusion of minor though seemingly contradictory considerations? But the language of these laws is by no means equivocal. Except for the exemption contained in the second proviso of the 4th section of the Ohio statute of 1831, all mails and the carriages in which they are transported, the troops, arms, and property of the United States of every description, would have been subject to the payment of tolls; and the exemption can be extended no further than the plain and natural import of the language of that proviso will justify.

Again, it has been said, that the exaction of tolls from travellers in the mail stages would be a violation of the contract, because by such a demand travellers would be excluded from those stages, and that the safety of the mails would be endangered by this exclusion; it being assumed by this argument that the travellers are to constitute a guard to the mails. To this seemingly strange and far-fetched argument, it might be sufficient to answer, as was done to the former, that no stipulation for the transportation of such a guard, (if by any violence to language ordinary casual wayfarers could be so denominated,) is contained in the contract; and that the attempt thus to introduce any such stipulation or ingraft it upon that contract, is a palpable and unwarrantable interpolation upon its terms and its objects. In the next place, the propounders of this argument may be challenged to show either the duty or the willingness of such travellers, to take upon themselves the hazards, the trouble, or the

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responsibilities of guarding the United States mails. With equal cogency may those who thus reason be called upon to prove, that amongst the promiscuous multitudes who travel in stages, there may not be comprised those who roam the country with the view of committing depredations, and from whose designs the safety of the mails may be most endangered.

Upon a full consideration of this case, I am brought to conclude, * that the acts of the legislature of Ohio, subsequent in date to the 2d of March, 1831, and the proceedings of the board of public works of that State, founded upon those statutes, are in violation of no principle or right guaranteed by the constitution of the United States, nor of any acts of congress passed in pursuance thereof; nor of any contract at any time existing between the State of Ohio and the federal government. I am further of opinion, that the aforesaid laws of Ohio were on the contrary designed, and are of a tendency, fairly, and justly, to distribute the tolls collectable within her limits, on the road in question, so as to make them properly subservient to the views of the federal government and of the government of Ohio, at the times of passing of the state law, of February 4, 1831, and the act of congress of the 2d of March, 1831; and in conformity with the express language of those laws; and to prevent unwarrantable monopoly, and serious if not fatal detriment to the road. I think that the decision of the supreme court of Ohio, being a correct exposition of the laws designed to effect these important objects, ought therefore to be affirmed.

7 H. 283; 12 H. 293.

LESSEE OF PHILIP HICKEY *et al.*, Plaintiff in Error, v. JAMES A. STEWART, *et al.*

3 H. 750.

A decree of a court of equity declaring that the complainant is the equitable owner of land, and ordering the defendant to convey it, though in part executed by a writ of *habere facias*, putting the complainant in possession, does not confer a legal title, and is not a bar to an action of ejectment.

The supreme court of Mississippi had not jurisdiction to examine and declare the validity of an inchoate Spanish title, and its proceedings in that behalf were merely void.

THE case is stated in the opinion of the court.

Coxe and Walker, for the plaintiffs.

Henderson, and *Jones*, contra.

* M'KINLEY, J., delivered the opinion of the court. [* 756]

This case is brought before the court by a writ of error to the circuit court for the southern district of Mississippi.

The plaintiffs brought an action of ejectment against the defendants in the court below; and upon the trial, the plaintiffs read in evidence, to the jury, the copy of a plat and certificate of survey, signed by Charles Trudeau, royal surveyor of the province of Louisiana, for two thousand acres of land, French measure; and a patent, issued by the Spanish governor of that province, thereupon, to [* 757] James * Mather, dated the 3d of April, 1794; and a deed of conveyance from James Mather to George Mather, dated the 26th day of April, 1803, for the same tract of land; and they also read in evidence a certificate, dated the 10th day of April, 1806, signed by the commissioners, appointed by the President of the United States, under the act of congress, of the 3d of March, 1803,¹ and the act, supplemental thereto, of the 27th of March, 1804,² confirming to George Mather the said tract of land, by virtue of the articles of agreement and cession between the United States and the State of Georgia. It was also proved that George Mather died, about the year 1812, and that James Mather was his heir; and that James Mather had died pending the suit; and it was admitted by the defendants, that the plaintiffs were the heirs of James Mather, "and whatever title he had at his death vested in them or any others, his heirs, to be shown."

And it was admitted by the plaintiffs, "that the defendants were in possession of the land in controversy, and were so at the time this suit was brought, under derivative titles from Robert Starke's heirs, valid so far as Starke's title was valid." And the defendants in support of the issue, on their part, offered to read the record of the proceedings in a suit in chancery, in the supreme court of the State of Mississippi; in which the heirs of Robert Starke were complainants, and the heirs of James Mather, defendants. And by which record it appeared, that the complainants set up and claimed title to the land, here in controversy, under a warrant or order of survey, for two thousand acres of land, dated about the 29th day of December, 1791, and the survey thereon; and the defendants claimed title under the survey and patent of the Spanish government to James Mather. And by the order and decree of that court, the land, in controversy in this suit, was adjudged and decreed to the heirs of Robert Starke.

To the reading of which record and proceedings, as evidence to the jury, the plaintiffs objected, on these grounds: First. That it does not purport to be a record on its face, and in its context. Secondly.

¹ 2 Stats. at Large, 229.

² 2 Ib. 303.

That said record does not disclose, nor contain a final decree; neither the said record, nor the said decree therein being signed by the judges of the said supreme court of Mississippi. Thirdly. That the pleadings and context of said record show, that the chancery suit was entertained and treated by said supreme court as a matter of original jurisdiction; whereas the statutes of Mississippi expressly provide, that the opinion of the supreme court shall be certified to the court below, whose action and adoption alone can render the opinion of the supreme court final upon a question of law adjourned for its opinion. Fourthly. That the facts and the law of the case, did not give the chancery court jurisdiction, inasmuch as, after the treaty of 1783, a Spanish warrant or order was a mere nullity, and could only be rendered valid, by the holder bringing himself within the first section of the act of congress of 1803, by * residence [* 758] and cultivation; whereas, as the record shows, that Starke was not within that act; nor, if he had been, could he have derived any equity against a title, confirmed by the articles of agreement and cession between Georgia and the United States, of the 14th of April, 1802. Fifthly. That jurisdiction, legal and equitable, was vested elsewhere, by the 6th section of the act of 1803; such investiture of jurisdiction in an inferior tribunal being exclusive of that of any other tribunal. Sixthly. That a record or decree out of chancery is not evidence of a legal, but an equitable title only, and is, therefore, not pertinent to the issue joined. Seventhly. That the decree, if read at all, must be read as an estoppel by the record, and subject to the rules as to estoppels. Eighthly. That a decree in chancery must be read on the same footing as a judgment at law; and unless carried out by a conveyance, can have no greater effect than a judgment in ejectment."

The court overruled these objections, and permitted the record to go to the jury, as evidence of any fact decided by it. To which opinion of the court the plaintiffs excepted. The plaintiffs, among other instructions, some of which were refused and some granted, but which need not be noticed here, moved the court to instruct the jury, "that the decree read in evidence, by the defendant's counsel, does not *per se* divest the plaintiffs, or the ancestors of the plaintiffs, of the legal title, but that said title remains unaffected at law by said decree, and is still in plaintiffs, if the jury believe them to be the heirs of said Mather."

There were several instructions moved by the defendants, some of which were granted, and some refused; but as they are either included in the ruling of the court, already noticed, or unnecessary to the de-

cision of the points on which we think this case ought to be decided, they will not be noticed in the investigation of the subject.

Two questions are distinctly presented by the ruling of the circuit court. First. Whether the decree in the suit in chancery was a bar to the action of the plaintiffs. Secondly. Whether the court of chancery had jurisdiction of the subject-matter in controversy before it in that case. For the plaintiffs in error, it has been insisted, that the decree is not evidence of a legal title, even if it were otherwise valid, and, therefore, no bar to the action of ejectment; and that the possession of the defendants under the decree, without a deed of conveyance as directed by it, whether by the writ of *habere facias possessionem* or otherwise, gave no legal title to the defendants; and, therefore, opposed no legal bar to the plaintiffs' action. And, secondly, it was insisted, that neither the court of chancery, nor the supreme court of the State of Mississippi, had jurisdiction of the subject-matter presented by the bill of the complainants. The whole power to confirm Spanish titles, protected by the contract of cession by the

State of Georgia to the United States, having been conferred, [* 759] by act of congress, on a board of commissioners, * whose decision was by law made final, no other court could decide upon the validity of those claims.

The converse of these propositions was maintained by the counsel for the defendants. And it was insisted that the decree operated as a conveyance, and also as a judgment in ejectment, the court of chancery having the power by statute to award the writ of *habere facias*; and, therefore, the decree, and possession under it, is a legal bar to the action of ejectment. And, upon the second point, it was insisted that the jurisdiction of the court over the subject-matter of the decree could not be inquired into by the court below, nor by this court, when brought before either collaterally. To arrive at the legal effect of the decree, we must inquire into the object and intention of the complainants in bringing the suit in chancery. They charge in their bill, that James Mather had obtained from the Spanish government the legal title to the land in controversy, in fraud of the rights of their ancestor, Robert Starke; and they pray that, by decree of the court, Mather may be compelled to surrender to them the full and entire possession of the land, together with the evidences of title which he has thereto, and that they may be quieted in their title; "and such other and further relief in the premises as to the court shall seem meet."

The court, by its decree, established the right of the complainants to the land in controversy, and ordered Mather's heirs, who were all non-residents of the State of Mississippi, to convey the land to the

complainants, and to deliver to them the possession, and awarded the writ of *habere facias*; which writ the court of chancery is authorized to order by a statute of the State. Without the aid of this writ, the court could not have put the complainants into possession, the defendants being out of their jurisdiction; nor could they, for the same reason, compel a conveyance of the title to the land. The decree is, therefore, if otherwise valid, nothing more than an equitable right, ascertained by the judgment and decree of a court of chancery; and until executed by a conveyance of the legal title, according to the decree, Starke's heirs, and those claiming under them, have nothing but an equitable title to the land in controversy.

To enable the defendants in this case to defend their possession successfully, upon their own title, that title must be shown to be a good and subsisting legal title, and superior in law to that set up by the plaintiffs; otherwise it opposes no legal bar to the recovery in the action of ejectment. And conceding, what was contended for in argument, that the decree and possession under it, by the writ of *habere facias*, is equivalent to a judgment in ejectment, followed by like possession, it would avail the defendants nothing in this case, because such a judgment and possession are no bar to another action or ejectment for the same premises. The defendant in ejectment can never defend his possession against the plaintiff upon a *title in himself, by which he could not recover the pos- [* 760] session, if he were out, and the plaintiff in possession. Reversing the positions of the parties in this case, could the defendants, if plaintiffs, recover the land in controversy upon this decree, and evidence of possession under it, against the title of the plaintiffs? We have no hesitation in saying they could not; and, therefore, the decree, if founded upon a valid equitable title, would be no legal bar to the action of the plaintiffs.

To a correct understanding of the question of jurisdiction, argued at the bar, it is necessary to ascertain the character of the grant set up by Starke's heirs in the suit in chancery. This grant was obtained from the Spanish governor of Louisiana, prior to the treaty between the United States and Spain, of the 27th of October, 1795.¹ By this treaty, Spain admitted she had no right to the territory north of the thirty-first degree of north latitude. In consequence of which all the grants made by her authority within that territory, were void. This territory, then, belonged to the State of Georgia; but by deed, bearing date the 24th day of April, 1802, she ceded it to the United States. And in that deed it was stipulated, "that all persons who,

¹ 8 Stata. at Large, 138.

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on the 27th of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day, by the former British government, or the government of Spain," &c. The 1st section of the act of congress of the 3d of March, 1803, c. 80, (2 Story's Laws, 893,) enacts: "That any person or persons that were residents in the Mississippi territory on the 27th of October, 1795, and who had prior to that day obtained, either from the British government of West Florida, or the Spanish government, any warrant or order of survey for lands lying within said territory, to which the Indian title had been extinguished, and which, on that day, had been actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands in the same manner as if their claims had been completed." This section places those who had obtained a warrant or order of survey upon the same ground with those who had complete titles. The 5th section of the act declares: "That every person claiming lands by virtue of British grant, or of the first three sections of this act, or of the articles of agreement and cession between the United States and the State of Georgia, shall, before the last day of March, 1804, deliver to the register of the land-office, within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, before that day, deliver to said register, for the purpose of being recorded, every grant, order of survey, deed of conveyance, or other written evidence of his claim, and the same shall be recorded by the said register in books to be kept for that purpose." And, upon the failure of the claimant to [* 761] comply with these requirements, "his claim is declared to be void, and shall never "be received or admitted as evidence in any court in the United States against any grant derived from the United States."

The 6th section of the act provides for the appointment of two boards of commissioners, for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and the State of Georgia, and of the first three sections of the act. Each board was authorized to hear and decide, in a summary manner, all matters respecting such claims within their respective districts, and their determination was declared to be final.

The record of the chancery suit between Starke's heirs and Mather's heirs, shows that Starke was not resident in the Mississippi territory on the 27th of October, 1795, but had removed therefrom some years before that period; that no notice of his claim had been

given to the register of the land-office, within whose district it lay, together with a plat of the tract claimed and delivered to the register, to be recorded as required by law. Nor does it appear that the claim was ever submitted to the board of commissioners for their determination. Many years afterwards, the exact time not appearing by the imperfect record read in evidence, the court of chancery for the Mississippi territory, without any authority having been conferred on it by act of congress for that purpose, took cognizance of Starke's claim, and established its validity by its own judgment and decree.

In the case of *Henderson v. Poindexter*, 12 Wheat. 543, 544, the court says: "The whole legislation on this subject requires that every title to lands in the country which had been occupied by Spain, should be laid before the board of commissioners. The motives for this regulation are obvious, and, as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain, if the law which gave validity to their claims, should also provide to examine their fairness, and should make the validity depend upon their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal which the legislature had provided for its examination, and has, therefore, not brought himself within the law. No act of congress applies to a grant held by a non-resident of the territory, in October, 1795, which has not been laid before the board of commissioners. It is true that no act has declared such grants void; but the legislature has ordered the lands to be sold which were not appropriated in a manner recognized by law, and the land in controversy is of that description.

"If this view of the subject be correct, no Spanish grant made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the contract with Georgia, or has been laid before the board of commissioners." This tribunal was created for the express purpose of deciding all questions arising under the deed of cession by Georgia, securing to a particular class of claimants the lands they occupied and cultivated at the date of the treaty between the United States and Spain, of the 27th of October, 1795, and its decision was to be final; and therefore its jurisdiction was exclusive, unless, by express words, congress had conferred concurrent jurisdiction on some other judicial tribunal. From these propositions results the inquiry, whether the decree in the chancery suit was void, the court having no jurisdiction of the subject-matter of the decree, or only erroneous and voidable? If the former, then its validity was inquirable into in the current court, when offered as evidence, and it ought to have been rejected.

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According to the decision in the case of *Henderson v. Poindexter*, above referred to, Starke's claim, when submitted by his heirs to the court of chancery, was utterly void; and no power having been conferred by congress on that court, to take or exercise jurisdiction over it for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void.

In the case of *Rose v. Himely*, 4 Cranch. 241, Chief Justice Marshall said: "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court, then, is of necessity examinable, to a certain extent, by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which its acts must be looked into, and its authority to decide questions which it professes to decide, must be considered." "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined." In the case of *Elliott and others v. Piersol and others*, 1 Pet. 340, it was held by this court that, "where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered in law trespassers. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

The same doctrine was maintained by this court in the [* 763] case of * *Wilcox and Johnson*, 13 Pet. 511, and the case of *Elliott and others v. Piersol and others*, referred to, and the decision approved. These cases being decisive of the question of jurisdiction, we deem it unnecessary to refer to any other authority on that point. From the view we have taken of the whole subject, it is our opinion, the decree of the supreme court of Mississippi would have been no bar to the action of the plaintiffs in this case, if the

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subject-matter of the suit had been within its jurisdiction. But we are of the opinion, that court had no jurisdiction of the subject-matter, and that the whole proceeding is a nullity. The circuit court erred, therefore, in permitting the record to be read to the jury, as evidence for any purpose whatever. Wherefore the judgment of the circuit court is reversed.

3 H. 787; 6 H. 31; 8 H. 495; 9 H. 155; 10 H. 627.

THOMAS WILSON AND COMPANY, Plaintiffs, v. HORACE SMITH,
Defendant.

3 H. 763.

If the owner of the bill send it to an agent, not residing at the place where it is payable, for collection, the agent has an implied authority to employ a sub-agent at that place; and if the sub-agent receive the contents, the owner can sue him for money had and received, though the sub-agent had no notice when he collected the money, that the agent was not the owner.

And in such a case, the sub-agent cannot retain part of the proceeds, on account of a debt of the agent, unless he has given credit on the faith that the agent owned the bill.

CERTIFICATE of division of opinion by the judges of the circuit court of the United States for the district of Georgia. The record was as follows:—

“This was an action of *assumpsit* brought in this court by the plaintiffs, to recover from the defendant the sum of \$800 and interest, being the amount of a draft or bill of exchange drawn by one Henry B. Holcombe, of Augusta, in the State of Georgia, upon one Charles F. Mills, of Savannah, in said State, and accepted by him, and paid to the defendant. The declaration contained two counts. The first was for money collected and received by the defendant to and for the use of the plaintiffs, upon the particular bill of exchange set out and described in the declaration; the second count was generally for money had and received. The plea of *non-assumpsit* was pleaded by the defendant in bar of the action, ‘it being proved that the draft or bill of exchange, upon which the money was collected and received by the defendant, was the property of the plaintiffs;’ that it had been by them placed in the hands of their agent, David W.

St. John, at Augusta, Georgia, for *collection, and by him, [*764] St. John, forwarded to the defendant, St. John’s agent, at Savannah, Georgia, for acceptance and collection; that it was accepted and paid to the defendant, by whom the proceeds were received and credited to the account of St. John, from whom the defendant received the draft or bill for collection, and who was indebted to the defendant at the time. That at the time the said bill was so paid to the defendant, and by him credited to the account of St.

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John, he, St. John, had failed in business, and had departed this life; that he failed, and had not recovered his affairs at the time of his death, and was insolvent; that the credit for the amount of the bill, carried by the defendant to St. John's account, was made in payment of a previously existing debt due by St. John to the defendant, no new transaction having arisen between the defendant and St. John after the payment of the said bill to the defendant; 'that, to secure the payment of his debt to the defendant, St. John had transferred to the defendant three hundred shares of the capital stock of The Augusta Insurance and Banking Company, upon which \$100 per share had been paid; that the defendant appeared satisfied with this security, and that St. John would then have given additional security had the defendant required it.' That the draft or bill of exchange was made payable to the order of Henry B. Holcombe, the drawer, and by him indorsed in blank, and indorsed by St. John to H. Smith, Esq., (the defendant,) or order. That, when the draft was sent to the defendant for collection, he was not apprised to whom it belonged, nor were any instructions or directions given to him as to the disposition of the money when collected.

"The following point was presented, during the progress of the trial, for the opinion of the judges, on which the judges were opposed in opinion, namely: Whether there was such privity of contract between the plaintiffs and defendant, either express or implied, as would enable the plaintiffs to maintain the action for money had and received.

"Which said point, upon which the disagreement has happened, is stated above, under the direction of the judges of the said court, at the request of the counsel for the parties in the cause, and ordered to be certified into the supreme court of the United States, at the next session, pursuant to the act of congress in such case made and provided."

Berrien, for the plaintiffs.

Nelson, (attorney-general,) for the defendant.

[* 769] *TANEY, C. J., delivered the opinion of the court.

We think the question certified has been settled by the decision of this court, and that it is unnecessary to go into an examination of the English laws which were cited in the argument. It is admitted that the bill was the property of the plaintiff, and was transmitted to St. John, at Augusta, for collection, and by him transmitted to the defendant, at Savannah, where the drawer resided; and

that no consideration was paid for the bill, either by the defendant or St. John. According to the usual course of dealing among merchants, the transmission of the paper to St. John gave him an implied authority to send it for collection to a sub-agent at Savannah, for it could not have been expected by the plaintiff that St. John was to go there in person, either to procure the acceptance of the bill, or to receive the money, nor could St. John have so understood it. So far, therefore, as the question of privity is concerned, the case before us is precisely the same with that of the *Bank of the Metropolis v. The New England Bank*, 1 How. 234. In that case, the bills upon which the money had been received by the plaintiff in error, were the property of the New England Bank, and had been placed by it in the hands of the Commonwealth Bank for collection, and were transmitted by the last-mentioned bank to the Bank of the Metropolis, in Washington, where the bills were payable. And upon referring to the case, it will be seen that the court entertained no doubt of the right of the New England Bank to maintain the action

* for money had and received, against the Bank of the Me- [*770] tropolis; and the difficulty in the way of its recovery in the action was not a want of privity, but arose from the right of the Bank of the Metropolis to retain, under the circumstances stated in the case, for its general balance against the Commonwealth Bank. In that case, as in the present, the agent transmitting the paper appeared, by the indorsements upon it, to be the real owner, and the party to whom it was transmitted had no notice to the contrary, and the money received was credited to the Commonwealth Bank. We think the rule very clearly established, that whenever, by express agreement between the parties, a sub-agent is to be employed by the agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction, the principal may treat the sub-agent, as his agent, and when he has received the money, may recover it in an action for money had and received.

Another question has been raised in the argument, that is, whether the defendant has a right to retain on account of the money due to him from St. John? As this point has not been certified, it is not regularly before the court, yet as it has been fully argued on both sides, and evidently arises in the case, it seems proper to express our opinion upon it, as it may save the parties from further litigation and expense.

Upon this part of the case, as well as upon the question certified, we think the case of the *Bank of the Metropolis v. The New England Bank*, 1 How. 234, decisive against the defendant. It appears

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from the statement that he made no advances, and gave no new credit to St. John on account of this bill. He merely passed it to his credit in account. Now if St. John had owed him nothing, upon the principles we have already stated, the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of the Bank of the Metropolis and the New England Bank, it appeared in evidence that there had for a long time been mutual dealings between these two banks, in the collection of money for each other, and that balances were suffered to remain, and credit given, upon the faith of the paper transmitted or expected to be received, according to the usual course of their business with one another. And the court held, that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money; the hazard he ran by the extension of the credit giving him as just and equitable a right to retain, as if he had incurred responsibility by an advance of money. The right to retain, in that case, depended upon the fact that credit was given. [*771] But in * the case at bar, this fact is expressly negatived, and there is no ground, therefore, upon which he can retain, according to the principles decided in the case referred to.

As this point, however, is not in strictness regularly before this court, we shall confine our answer to the question sent here for decision, and shall direct it to be certified to the circuit court, that there was such a privity of contract between the plaintiffs and defendant, as would enable the former to maintain the action for money had and received.

THOMAS B. WINSTON v. THE UNITED STATES.

3 H. 771.

Nelson, (attorney-general,) moved to dismiss.

TANEY, C. J. A motion has been made to dismiss the case for want of jurisdiction.

It appears that an action was brought by the United States against the plaintiff in error, in the district court of the United States for the northern district of Mississippi, (the said court having the powers of a circuit court,) for the purpose of recovering damages against the plaintiff in error, who was a notary public, for having failed to give notice to the indorsers of a promissory note, put into his hands for pro-

Ross v. Prentiss. 3 H.

test, whereby the United States lost their remedy against them. The note was for \$537.27, and the damages in the declaration laid at \$1,000. There was a verdict and judgment for the sum of \$750.36, and it is upon this judgment that the writ of error is brought.

The matter in dispute is below the amount necessary to give jurisdiction to this court, and the writ of error must therefore be dismissed.

HUGH ROSS, Administrator of HIRAM PRATT, deceased, Appellant, v.
WILLIAM PRENTISS, Marshal, Defendant.

3 H. 771.

Where the question is whether property of greater value than \$2,000 is liable to be taken in execution for a less sum than \$2,000, the latter is the amount in dispute, and there can be no appeal.

Nelson, (attorney-general,) moved to dismiss.

* TANEY, C. J. It appears from the record in this case [*772] that a bill in chancery was filed in the circuit court for the district of Illinois, by the appellant against the appellee, who was the marshal for that district, stating, among other things, that the United States had recovered a judgment in the district court for the district of Illinois, against one John S. C. Hagan and Gholson Kirchenal, for the sum of \$600 damages, and \$35.25, costs, upon which an execution had been issued, directed to the said marshal, who had levied it upon a certain lot of land and premises described in the bill, upon which the complainant, as administrator as aforesaid, held a mortgage to a large amount mentioned in the bill, and which he was then proceeding to foreclose; and averring that the said property was not chargeable with the said judgment, and that he was in danger of losing the benefit of his mortgage, by a sale under the execution, and praying that the marshal might be enjoined from making such sale.

Upon this bill an injunction was granted, and the appellee afterwards put in his answer, and the cause was proceeded in until a final hearing, when the injunction was dissolved and the bill dismissed.

It is unnecessary to state more particularly the character of the controversy, because the case now comes before us on a motion to dismiss, upon the ground that the matter in dispute is not sufficient in amount to give jurisdiction to this court.

The motion is resisted by the appellant, who insists that the jurisdiction depends on the value of the property upon which the execution has been laid, and the amount of the appellant's interest in it. And as the property is worth much more than the sum required to

 United States v. King. 3 H.

give jurisdiction, and the mortgage also for a larger amount, he has a right to appeal to this court from the decree of the circuit court; because, as he alleges, he may lose the whole benefit of his mortgage by a forced sale under the execution.

We think otherwise. The only matter in controversy between the parties is the amount claimed on the execution. The dispute is, whether the property in question is liable to be charged with it or not. The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and as that amount is in this case below \$2,000, the appeal must be dismissed.

THE UNITED STATES, Plaintiff in Error, v. RICHARD KING and DANIEL W. COXE, Defendants.

3 H. 773. •

Though a document, purporting to be a return of a Spanish survey, had been recognized by the Spanish colonial authorities as genuine, and is therefore to be deemed so, *primâ facie*, yet it may be shown to be antedated and forged.

A Spanish grant, which did not contain any description by which the land could be located, and was connected with no survey, did not create any private property, in any part of the public domain; such a title was not confirmed by the treaty of cession of Louisiana.

An equitable Spanish title, not confirmed by the United States, cannot prevail against a legal title acquired from the United States.

The act of April 29, 1816, § 1, (3 Stats. at Large, 329,) did not confirm the title to a quantity of land exceeding one league square.

ERROR to the circuit court of the United States for the eastern district of Louisiana, in a petitory suit. The decision of the court did not proceed upon the particular terms of the documents introduced, and is entirely intelligible without their insertion.

Nelson, (attorney-general,) for the United States.

Coxe, contra.

[* 784] * TANEY, C. J., delivered the opinion of the court.

This case is one of great importance, from the amount of property in dispute; and if the court entertained any doubt upon the questions of law or of fact which are presented by the record, we should regard it as our duty to hold it under advisement, and postpone the decision to another term. But the principles of

[* 785] law upon which it * depends are not new in this court, and have often been the subjects of discussion and consideration since the cession of Louisiana and Florida to the United States. And having, after a careful examination of the evidence, formed a

decided opinion upon the facts in the case, we deem it proper to dispose of it without further delay.

The claim in question arises upon two instruments of writing, executed by the Baron de Carondelet, civil governor of Louisiana; one in 1795, and the other in 1797; the latter of which is alleged, by the defendant in error, to be a grant to the Marquis de Maison Rouge, for the land included in a plat made out by Trudeau, the surveyor-general of the province, and dated the 14th of June, 1797, and which survey embraces the land in controversy. It is insisted, on the part of the United States, that this certificate of Trudeau is antedated and fraudulent; and in order to determine the state of the facts upon which the questions of law will arise, the authenticity of this survey will be the first subject of inquiry.

Upon this point, a good deal of testimony has been taken upon both sides. But it would extend this opinion to an unreasonable and unnecessary length, to enter upon a minute comparison and analysis of the testimony of the different witnesses, and of the other evidence contained in the record. It is sufficient to say, that, after an attentive scrutiny and collation of the whole testimony, we think it is perfectly clear that this certificate of Trudeau is antedated and fraudulent, and we refer to the evidence of Filhiol, McLaughlin, and Pomier, as establishing conclusively that the actual survey upon which this certificate was made out, did not take place until December, 1802, and January, 1803; and that the one referred to by the governor, in the paper of 1797, was for land in a different place, and higher up the Washita River. We are entirely convinced that the survey now produced was not made in the lifetime of the Marquis de Maison Rouge, who died in 1799, but after his death, and at the instance of Louis Bouligny, who, according to the laws of Louisiana, was what is there termed the forced heir of the marquis; and that it was made in anticipation and expectation of the cession of the country to the United States; the negotiations upon that subject being then actually pending, and the treaty of cession signed on the 30th day of April, 1803.¹ We see no reason to doubt the truth of the witnesses to whom we have referred. On the contrary, they are supported by the testimony of other witnesses, and by various circumstances detailed in the record.

It has, however, been argued that, inasmuch as an attested copy of this certificate, with the two instruments executed by the Baron de Carondelet, were delivered to Daniel Clarke, in August, 1803, by the Spanish authorities at New Orleans, upon this application for

¹ 8 Stats. at Large, 200.

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the documentary proofs of the title to this land, the authority of the paper in question ought not to be impeached; and that it is inconsistent with the comity due to the officers of a foreign [*786] *government, to impute to them fraud, or connivance in a fraud, in an official act where their conduct has not been questioned by the authority under which they were acting, and to which they were responsible. This proposition is undoubtedly true, where no other interest is concerned except that of their own government or its citizens. And as regards the interest of others, the acts of the officer, in the line of his duty, will *prima facie* be considered as performed honestly, and in good faith. And although this certificate, and the other documents, were delivered to Clarke after the country had been ceded to the United States, yet as possession had not been taken, and the evidences of titles to lands in the ceded province were still lawfully in the hands of the Spanish authorities, the documents upon that subject, obtained from the proper officer, ought to be regarded as genuine, unless impeached by other testimony; and to that extent this court is bound to respect the certificate in question. But it would be pushing the comity usually extended to the tribunals and officers of a foreign government, beyond the bounds of justice and the usages of nations, to claim for them a total exemption from inquiry, when their acts affect the rights of another nation or its citizens. Certainly, the political department of this government has never acknowledged this immunity from inquiry, now claimed for the Spanish tribunals and officers; and in every law establishing American tribunals to examine into the validity of titles to land in Louisiana and Florida, derived from the government of Spain, they are expressly enjoined to inquire whether the documents produced in support of the claim are antedated or fraudulent; and we have no doubt that it is the right of this court to hear and determine whether the certificate of Trudeau, although recognized and sanctioned by the colonial authorities of Spain, is antedated and made out either with or without their privity and consent, in order to defraud the United States, and to deprive them of lands which rightfully belonged to them under the treaty; and that it is our duty to deal with it as the evidence may require. We desire however, to be understood, when speaking upon this subject, as not intending to charge the present claimants with having participated in the fraud; but from the testimony in the record, we are fully convinced that it was committed in the manner hereinbefore mentioned, by Boulogny, under whom they claim title.

Regarding the case in this point of view, the right of the defendant in error must stand altogether upon the instruments executed in

1795 and 1797, by the Baron de Carondelet; and it has not the aid of any authentic survey, to ascertain and fix the limits of the land, and to determine its location. The instruments themselves contain no lines or boundaries, whereby any definite and specific parcel of land was severed from the public domain; and it has been settled, by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if the description was * vague and indefinite, as in the case before us, and [*787] there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice. It was so held in the cases reported in 15 Pet. 184, 215, 275, 319, and in 16 Pet. 159, 160. After such repeated decisions upon the subject, all affirming the same doctrine, the question cannot be considered as an open one in this court. Putting aside, therefore, and rejecting the certificate of Trudeau, for the reasons before stated, the instruments in question, even if they could be construed as grants, conveyed no title to the Marquis de Maison Rouge for the land in question, and consequently, the defendants in error can derive none from him. The land claimed was not severed from the public domain, by the Spanish authorities, and set apart as private property, and, consequently, it passed to the United States, by the treaty which ceded to them all the public and unappropriated lands. It is unnecessary, therefore, for the decision of the case, to say any thing in relation to the construction and effect of these two instruments, or the purposes for which they were intended.

As relates to the claim of an equitable title arising from the number of immigrants alleged to have been introduced under these instruments, it would not avail the defendant in error in this action, even if the proofs showed a performance equal to that contended for on his part. For if these instruments were regarded as grants, and it appeared that the Marquis de Maison Rouge had originally selected this very district as the place where the grant was intended to be located; and the immigrants introduced by him had been settled upon it in performance of the conditions of his contract; and if it should be held that he had thereby acquired an equitable right to have the quantity of land mentioned in the paper of 1797 laid off to him at this place, still, it would be no defence against the United States. For in the case of *Choteau v. Eckhart*, 2 How. 375, this court decided that an imperfect title derived from Spain, before the cession, would not be supported against a party claiming under a grant from the United States, unless it had been confirmed by act of congress. The same point was again fully considered and decided, at the present

term, in the case of *Hickey and others v. Stewart and others*, 3 How. 750. These decisions stand upon the ground that such titles are not confirmed by the treaty itself so as to bring them within judicial cognizance and authority; and that it rests with the political department of the government to determine how and by what tribunals justice should be done to persons claiming such rights. If, therefore, this controversy was in a court of equity, and no suspicion of fraud rested upon the claim, yet it could not be supported against a grantee of the United States, because congress has not confirmed it, nor authorized any other tribunal to determine upon its validity. This

case, however, is in a court of law; the petitory action [*788] brought by *the United States in the circuit court of Louisiana, being in the nature of an action of ejectment in which the decision must depend on the legal title; and that title under the treaty of cession being in the United States, an equitable title, if the defendant in error could show one, would be no defence.

It has indeed been urged in the argument, that the act of April 29, 1816, § 1, 3 Story's Laws, 1604, confirmed this grant to the claimants to its whole extent. Upon this point we do not think it necessary to go into a particular and minute examination of the acts of congress upon this subject, nor indeed of the act referred to. Because the provision in this act, that the confirmation shall extend only to the quantity of land contained in a league square, is, in the judgment of the court, too clear and unambiguous to admit of serious controversy. The restriction of the confirmation to the quantity above mentioned, appears to be as plainly stated in the proviso as language could make it; and congress certainly, in a claim of this description, addressing itself to the political power, had a right to confirm a portion of the claim, and, at the same time, to refuse to give the claimant a title to the residue, if they supposed it just to do so. .

Another question of more difficulty arises under this act of congress, but as it has not been pressed in the argument, we forbear to express an opinion upon it. It appears that the claimant has accepted a patent for a league square. In similar cases in Florida, the act of congress upon that subject provided, that the patent for the quantity confirmed should not issue unless the claimant released all title to the residue. The law in relation to the land in question does not, it is true, require this release, and the patent was issued and accepted under an understanding with the commissioner of the general land-office, that the acceptance should not prejudice the claim to the residue. Yet it is a question worthy of serious consideration, how far the acceptance of the land proffered by congress, even under these

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circumstances, must affect any title to the residue, which the party might be supposed to have had, and ought to influence the judgment of the court where the fact appears in the record. It is unnecessary, however, to pursue the inquiry, since, for the reasons before stated, the judgment of the circuit court must be reversed.

7 H. 833; 8 H. 48; 9 H. 421, 451; 11 H. 115, 509, 552, 663; 17 H. 542.

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ACTION.

1. A public officer is not liable to an action for an honest mistake, made in a matter where he was obliged to exercise his judgment, though an individual may suffer from his mistake. *Kendall v. Stokes*, 296.
2. An application by a private person for a writ of *mandamus*, proceeds upon the ground that he has no other adequate remedy; and after the *mandamus* has been awarded, the applicant cannot have an action on the case for the same cause for which the *mandamus* was granted, though he may for disobeying the *mandamus*. *Ib.*
3. The effect of the 2d section of the act of March 3, 1839, (5 Stats. at Large, 348,) is, that an action cannot be maintained against a collector of customs to recover back money illegally exacted by him as, and for, duties, although paid under protest. *Cary v. Curtis*, 409.
4. An action at law by the bearer will lie on a note payable to A B or bearer for the use of an unincorporated company, of which the promisors are members. *Bonnafée v. Williams*, 558.

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It belongs to the jurisdiction of the admiralty to entertain suits to try the title to proceeds in the registry of the court. *Andrews v. Wall*, 555.

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AGENT.

1. If the owner of the bill send it to an agent, not residing at the place where it is payable, for collection, the agent has an implied authority to employ a sub-agent at that place; and if the sub-agent receive the contents, the owner can sue him for money

had and received, though the sub-agent had no notice when he collected the money, that the agent was not the owner. *Wilson v. Smith*, 635.

2. And in such a case, the sub-agent cannot retain part of the proceeds, on account of a debt of the agent, unless he has given credit on the faith that the agent owned the bill. *Ib.*

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1. At the term when a verdict was rendered, a motion was made in arrest of judgment, for a misjoinder of counts, and the judgment was ordered to be arrested, but no formal judgment, that the plaintiff take nothing by his writ *non obstante veredicto*, was entered. At the second term following, the court, on motion, set aside the order arresting the judgment, allowed a *nolle prosequi* to be entered on one count to cure the misjoinder, and ordered the verdict to be entered on the other count, to which it appeared the evidence was applicable, and entered a judgment *nunc pro tunc* for the plaintiff. *Held*, 1. That this amendment of the verdict and of the record was within the power of the court under the statute of jeofails, (the 32d section of the judiciary act of 1789, 1 Stats. at Large, 91,) and, being an exercise of the discretion of the court below, it could not be revised by a writ of error. *Matheson's Administrators v. Grant's Administrator*, 114.
2. There is no fixed time within which verdicts and judgments may be amended; even after error brought, if within a reasonable time, such amendments may be allowed, and it is a salutary practice thus to cure mere formal defects. *Ib.*

APPEAL.

1. Though this court has jurisdiction of appeals only from final decrees of the circuit courts, yet, if this court actually entertains jurisdiction and affirms the decree of a circuit court, and remands the case for further proceedings, the question whether the decree appealed from was final, cannot be raised by a second appeal from the decree of the circuit court subsequent to those further proceedings; such an appeal brings under review only the proceedings of the circuit court subsequent to the mandate. *Washington Bridge Company v. Stewart*, 498.
2. An appeal bond, approved by the court, is sufficient, though signed by only part of the appellants. *Brockett v. Brockett*, 107.
3. A petition to open a final decree, filed and taken into consideration by the court at the same term in which the decree was made, suspends the decree, so that the ten days, allowed to supersede it by an appeal, do not begin to run till the petition is disposed of. *Ib.*

BOND, 1; CITATION; COSTS; COURTS OF THE UNITED STATES, 8. 14. 22.

ARBITRATION.

After an award, and the receipt of the money awarded, an action for the original cause cannot be maintained upon the ground that the claimant did not claim or prove before the referee all the damages he had sustained. *Kendall v. Stokes*, 296.

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BALTIMORE AND OHIO RAILROAD COMPANY.

The State of Maryland passed a law to subscribe \$1,000,000 to the stock of the Baltimore and Ohio Railroad Company, and providing that, if the company should be located so as not to pass through certain towns in the county of Washington, the company should forfeit \$1,000,000 to the State, for the use of Washington county. The company assented to this law, as part of its charter. *Held*, that this was a law inflicting a penalty; that nothing was due to the county by contract, and that the State could release and had released the penalty by a subsequent law to that effect. *Maryland v. Baltimore and Ohio Railroad Company*, 541.

BANKRUPT.

1. Under the bankrupt act of 1841, (5 Stats. at Large, 440,) fiduciary debts, contracted before the passage of the act, constitute no objection to the discharge of the debtor from other debts. *Chapman v. Forsyth*, 87.
2. A balance, due from a factor to his principal, is not a fiduciary debt within the meaning of that act. *Ib.*
3. A fiduciary creditor is not affected by proceedings in bankruptcy, unless he has voluntarily come in and proved his debt. *Ib.*
4. The bankrupt act of August 19, 1841, (5 Stats. at Large, 440,) conferred upon district courts of the United States power to determine the validity of a mortgage alleged to exist on the property of the bankrupt. *Ex parte Christy*, 451.
5. Under the bankrupt law of August 12, 1841, (5 Stats. at Large, 440,) a circuit court of the United States rightly dismissed a bill, the object of which was to deprive a creditor of the benefit of a judgment recovered in a state court prior to the bankruptcy, and which operated as a mortgage on the lands of the bankrupt, no fraud or other cause of invalidity being alleged. *Nugent v. Boyd*, 501.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A drawer had funds in the hands of the acceptor when the acceptance was made, but withdrew them, under an agreement to provide other funds before the maturity of the bill; if the drawer failed to keep this agreement he was not entitled to notice of the dishonor of the bill, for he had no right to expect it would be paid. *Rhett v. Poe*, 167.
2. If the holder of a bill is unable, by due diligence, to ascertain the residence of the drawer, he is excused from giving him notice of the dishonor of the bill. *Ib.*
3. If the drawer and acceptor are copartners in the transaction out of which the bill grew, the drawer is not entitled to notice. *Ib.*
4. An indorser of a note, intended to guarantee a bill of exchange, cannot avail himself of want of notice to the drawer of the bill. *Ib.*
5. Under an agreement between the third indorser and the indorsee, that the latter should send the note to the bank, where it was made payable, for collection, and in the event of its not being paid at maturity the indorsee should use due diligence to collect it from the maker and prior indorsers. *Held*, 1. That evidence of a usage of any banks except that at which the note was payable, was not admissible. 2. That the presentment of the note at that bank, and demand of payment there, when the

- note came to maturity, was a compliance with that part of the contract respecting the sending it for collection to that bank. 3. That an honest prosecution of a suit against the maker and prior indorsers, to a judgment and the return of *nulla bona* and proof of actual insolvency and absence from the State were due diligence, though executions were not sent into all the counties where all the defendants resided, and by an erroneous ruling of the court that judgment was for a less sum than should have been recovered. *Camden v. Doremus*, 535.
6. When the facts, upon which the question of due diligence depends, are ascertained, whether due diligence was used, is a question of law. *Rhett v. Poe*, 167.
 7. An indorser, who has settled with the maker, and discharged him from payment, is not entitled to notice of non-payment. *Burke v. McKay*, 35.
 8. It is not necessary, in Mississippi, or by the general law merchant, that a promissory note should be protested by a notary, or that he should give the notices of the dishonor. *Ib.*
 9. If a justice of peace be empowered, by statute, to act as a notary, he is one *quoad hoc*. *Ib.*
 10. Under the statute of Maryland, if a bill of exchange be paid, *supra protest*, for the honor of the payee, the first of three indorsers, who thereupon repays the amount of the bill, with interest and charges, to the person who took the bill for his honor, the payee thus becomes the holder of the bill, and may recover damages against the drawer. *Bank of the United States v. United States*, 257.
 11. Damages are allowed on bills as a compensation for not obtaining the money at the place stipulated, and not by way of a penalty. *Ib.*
 12. The United States, being a drawer of a protested bill, is liable to pay damages. *Ib.*
 13. A note, payable to G. and G., *prima facie* imports that there is a partnership. *Matheson's Administrators v. Grant's Administrators*, 114.
- ACTION, 4; AGENT; COLLATERAL SECURITY; COURTS OF THE UNITED STATES, 20; EXECUTORS, &c.; FACTOR; WITNESS.

BOND.

1. On a motion to dismiss the writ of error in this case, because the appeal bond ran to The People of the State of New York, or Frederick F. Backus, in the alternative, it was held that the bond was good, and, if forfeited, might be sued upon in the name of the people or of the relator, at the option of the government. *Spalding v. New York*, 35.
 2. It is not a defence to an action on the official bond of a receiver of public moneys, conditioned to keep safely the public moneys collected by him, that the money was feloniously stolen, without any fault on his part. *United States v. Prescott*, 559.
- APPEAL, 2; COURTS OF THE UNITED STATES, 21.

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1. *Griffin et al. v. Thompson*, 2 How. 244, reviewed and affirmed. *M'Farland v. Gwin*, 614.
2. *Taylor et al. v. Savage's Executor*, 1 H. 282, affirmed. *Taylor v. Savage's Executor*, 151.

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CHARITY.

1. The corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust. *Vidal v. Girard's Executors*, 61.
2. The 32 & 34 Hen. VIII. disabling corporations to take by devise, is not in force in Pennsylvania. Though the 43 Eliz. c. 4, is not in force in Pennsylvania, its conservative provisions are recognized, and charitable devises are not void in that State, on account of the inability of the trustee to take, or of the uncertainty of the beneficiaries. *Ib.*
3. A devise upon a trust to establish and maintain a college for the education of indigent orphan boys, is a charitable bequest, although the will of the testator excludes all ecclesiastics, missionaries, and ministers of all sects, from exercising any trust or duty concerning the college, and from admission for any purpose, or as visitors, within its precincts. *Ib.*

CITATION.

On motion of the defendant, this suit was dismissed because the citation was signed by the clerk and not by a judge, pursuant to the requirement of the 22d section of the judiciary act of 1789, (1 Stats. at Large, 84.) *United States v. Hodge*, 541.

WAIVER.

COLLATERAL SECURITY.

If a debtor indorse notes to his creditor as collateral security, the creditor does not make them his own by failing to give notice to the debtor on non-payment, according to the requirements of the commercial law; it is merely a question of due diligence, on the part of the creditor, to obtain payment. *Lawrence v. McCalmont*, 178.

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FACTOR.

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SHIPS &c. 1-3.

CONSTITUTIONAL LAW.

1. A state law, which prohibits property from being sold on execution for less than two thirds the valuation made by appraisers, pursuant to the directions contained in

the law, impairs the obligation of contracts, and is inoperative upon executions issuing on judgments founded on contract. *McCracken v. Hayward*, 228.

2. As to existing mortgages, foreclosable by a sale, the legislature could not prohibit the sale for less than half the appraised value of the land, because such a law impairs the obligation of a contract. *Gantley's Lessee v. Ewing*, 608.

3. Where the legislature of a State accepted from banking corporations a bonus, as a consideration for the franchise granted, and pledged the faith of the State "not to impose any further tax or burden upon them, during the continuance of their charters under this act," — *Held*, that a tax upon the stockholders, by reason of their stock, was a violation of this contract, and the tax was illegal. *Gordon v. Appeal Tax Court. Cheston v. Appeal Tax Court*, 338.

4. But the exemption lasted only during the continuance of the charters under that act; and when extended without any such promise, the power to tax revived. *Ib.*

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CORPORATION.

1. A provision in the charter of a corporation that transfers of its stock shall be made only on its books, is for the benefit of the corporation, and *bonâ fide* purchasers; third persons cannot take advantage thereof. It applies only to transfers of the legal, not of the equitable title. *Black v. Zacharie*, 527.

2. Though the positive or customary law of the place where the corporation is created governs the transfer of its shares, yet if there be no positive or customary law to the contrary, a transfer good by the law of the place of the owner's domicile is valid everywhere. *Ib.*

CHARITY; COURTS OF THE UNITED STATES, 18.

COSTS.

The matter of costs in the admiralty are not, *per se*, the subject of an appeal; and as they are in the sound discretion of the court, an appellate court should not, ordinarily, interfere with that discretion. *Harmony v. United States*, 91.

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REVENUE LAWS, 2.

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JURISDICTION.

COURTS OF THE UNITED STATES.

1. This court has not original jurisdiction of a petition for a *habeas corpus* by an alien who is a private person. *Ex parte Barry*, 34.

2. No court of the United States can issue a writ of *habeas corpus* to bring up a prisoner confined by state process, for any other purpose save to examine him as a witness. *Ex parte Dorr*, 320.

3. This court has not power, by a writ of prohibition, to revise the proceedings of the district court. *Ex parte Christy*, 451.

4. The amount necessary to the jurisdiction of this court, is the sum in controversy at the time of the judgment, and interest afterwards cannot be considered. *Knapp v. Banks*, 37.

5. If the plaintiff claims on the record more than \$2,000, and recovers less than that sum, he may have a writ of error. *Ib.*

6. The judgment must be for more than \$2,000 to enable the defendant to have a writ of error. *Knapps v. Banks*, 37.
7. In an action brought by the United States against a notary public, to recover damages laid at \$1,000, for having failed to give notice to the indorsers of a promissory note, for \$537.27, put into his hands for protest, there was a verdict and judgment for the sum of \$750.36, and upon this judgment, a writ of error was brought, and it was held that the matter in dispute was below the amount necessary to give jurisdiction to this court, and the writ of error was dismissed. *Winston v. United States*, 638.
8. Where the question is whether property of greater value than \$2,000 is liable to be taken in execution for a less sum than \$2,000, the latter is the amount in dispute, and there can be no appeal. *Ross v. Prentiss*, 639.
9. This court has no power to review its decisions; and after the expiration of the term at which a decree is entered, it becomes finally binding and conclusive, though the decree of affirmance was by a divided court. *Washington Bridge Company v. Stewart*, 498.
10. Though this court has not jurisdiction under the 25th section of the Judiciary Act of 1789, (1 Stats. at Large, 85,) to examine a perfect Spanish title, and decide whether the state court had given due effect thereto, yet if an imperfect Spanish title has been acted on by congress, and this court is called on to review the decision of a state court upon such statute title, this court must examine the Spanish title, for the purpose of ascertaining what effect the act of congress had thereon. *Chouteau v. Eckhart*, 136.
11. The treaty between the United States and France for the acquisition of Louisiana, confirmed titles as they existed under the local law; and the decision of the supreme court of Louisiana, upon a question of boundary of one of the grants made before the treaty, cannot be considered as denying a title claimed under a treaty, but only as applying that title, whose existence is admitted, to the land; and, consequently, this court has not jurisdiction under the 25th section of the judiciary act, (1 Stats. at Large, 85.) *McDonogh v. Millaudon*, 604.
12. And the same view is applicable to a confirmation of a French title by commissioners, under an act of congress, not by specific metes and bounds; they confirmed it as it existed, and it is for the local tribunals to ascertain its bounds. *Ib.*
13. On a petition to alter a mandate, originally issued in a Florida land case, in 1836, and concerning which a further order was made in 1838, asking to have the mandate so changed that the petitioner should be enabled to take the 16,000 acres, to which he was held entitled, out of any ungranted public lands in East Florida; it was held that the court had no power to grant the relief prayed. *Sibbald v. United States*, 187.
14. If a circuit court misconstrue one of the rules made by this court for regulating the equity practice of circuit courts, and dismiss the bill, this court will, upon appeal, reverse the decree, and remand the cause for further proceedings. *Poultney v. City of Lafayette*, 295.
15. The authority conferred on the courts of the United States by the act of May 19, 1828, (4 Stats. at Large, 278,) to alter final process, so as to conform it to any change which may be made in the laws of the States, does not empower the courts to adopt a state law in part, or with modifications; it must be adopted as enacted, if at all. *McCracken v. Hayward*, 228.
16. The Process Act of 1828, (4 Stats. at Large, 278,) adopted so much of the act of the State of Mississippi as authorized a judgment, by motion, against a sheriff for failing to pay over moneys collected on execution, and this is a proceeding in the original suit, over which a circuit court there has jurisdiction, though the plaintiff and the marshal are both citizens of the same State. *Gwin v. Breedlove*, 16.
17. The penal clauses of the act are not adopted. *Ib.*

18. A railroad corporation, chartered by the State of South Carolina, to build and manage a railroad in that State, may be sued by a citizen of New York, in the circuit court of the United States for the district of South Carolina, although some of the owners of shares of the capital stock are not citizens of South Carolina, and the State of South Carolina owned some of the shares. *Louisville, Cincinnati, and Charleston Railroad Company, v. Letson*, 193.
 19. A citizen of one State having the legal title, may sue a citizen of another State in a circuit court, without reference to the citizenship of the plaintiffs *cestuis que trust*. *Bonnafée v. Williams*, 558.
 20. The statute of Mississippi, requiring payees and indorsees to be joined in a suit by the holder of a promissory note, will not enable an indorsee to sue the maker and indorser in a circuit court of the United States, if the maker and payee were citizens of the same State. *Dromgoole v. Farmers and Merchants' Bank of Mississippi*, 108.
 21. The circuit court has jurisdiction, under the 11th section of the judiciary act of 1789, (1 Stats. at Large, 78,) of a suit in the name of the governor of a State on a sheriff's bond to the governor, if the parties beneficially interested in that suit be citizens of another State, and competent to sue the defendant. *McNutt v. Bland*, 1.
 22. The circuit court may quash a writ of *supersedeas* granted upon an appeal, if it becomes satisfied that sufficient security was not taken, and this court cannot review its proceeding, or issue a new writ of *supersedeas*, upon an inquiry and finding that the security was sufficient. *Black v. Zacharie*, 527.
- AMENDMENT; APPEAL; BANKRUPT, 4; BOND, 1; CITATION; DEVISE, &c. 7; EXCEPTIONS, 5. 6; LOUISIANA, 1; POOR DEBTOR; PUBLIC LANDS, 15; SUPERSEDEAS; TRUST, 1; WILL; WRIT OF ERROR.

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TREATY.

CUMBERLAND ROAD.

1. The act of the legislature of Pennsylvania, passed in 1836, imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within that State, is in conflict with the compact between that State and the United States, arising from the act of congress of March 3, 1835, (4 Stats. at Large, 772,) under which the State took possession of the road. *Searight v. Stokes*, 346.
2. The act of the legislature of Ohio, imposing a toll upon passengers in mail stage-coaches, over the Cumberland road, to the exclusion of all other passengers, does, in effect, exact a toll of mail coaches, and thus imposes upon the United States a part of the burden of supporting the Cumberland road, contrary to the compact between the State and the United States, under which the State took the road. *Neil v. Ohio*, 616.

CUSTOM AND USAGE.

BILLS OF EXCHANGE, 5.

DAMAGES.

- If a postmaster-general wrongfully refuse to give a credit to a contractor, and if the latter should be entitled to his action for damages, he cannot recover special damages for detention of the money, beyond interest. *Kendall v. Stokes*, 296.

BILLS OF EXCHANGE, &c. 10-12.

DEATH.

WRIT OF ERROR, 4.

DEBTOR AND CREDITOR.

COLLATERAL SECURITY.

DEED.

The act of Virginia of 1776, entitled "An act to enable persons living in other countries to dispose of their estates in this commonwealth with more ease and convenience," adopted by Kentucky, stood unrepealed in March, 1811, in Kentucky, so far as respects the mode of acknowledging a deed before a mayor or other chief magistrate of a city, &c. *Daviess v. Fairbairn*, 573.

DEMURRER.

PLEADING, 2. 3.

DEVISE AND LEGACY.

1. A devise to E. M. during his natural life, and in case he should have heirs lawfully begotten of him, then to him, his heirs and assigns; but if he should die without such an heir, the land to be sold, &c., gives to E. M. only an estate for life, to be enlarged into a fee on the happening of the contingency, according to the laws of Maryland. *Shriver's Lessee v. Lynn*, 25.
2. A testator, directing the continuance of a partnership of which he was a member at the time of his death, may either bind all, or a specific part, or only so much of his assets as are embarked in the business of the firm. *Burwell v. Cawood*, 203.
3. An intention to render the general assets liable, is only to be made out by the use of unambiguous language; and as the will in question does not clearly manifest that intent, the creditors of the firm have no claim upon the general assets. *Ib.*
4. The words "residuary legatee" may carry the real estate, where such can be made out, from other parts of the will, to have been the testator's intention. *Ib.*
5. Bequest to a daughter, to be delivered to her when she arrives at the age of eighteen years; but if she should die under that age, leaving no heir of her body, then over; she married at the age of sixteen. *Held*, that the husband could take nothing by his marital right till the wife arrived at the age of eighteen. *Price v. Sessions*, 569.
6. A testator, after having made provision for his wife and sons, and directed his executors to lay off a portion of his lands into lots for the site of a town, declares: "I wish my executors to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs." The words "for the use," &c., appeared to have been interlined. *Held*, that sales were directed of all the lots, and not merely of enough to pay debts. *Lane v. Vick*, 514.
7. This court does not hold itself bound by the construction of a will of lands, made by the highest court of a State, unless the construction arises from a settled rule of property. *Ib.*

CHARITY.

DISCHARGE FROM IMPRISONMENT.

POOR DEBTOR.

DISTRICT OF COLUMBIA.

Though the two counties of the District of Columbia are under the same political organization, yet congress has caused the laws of Virginia to continue in force within the one, and the laws of Maryland within the other; and a person declared by the laws of Maryland to be made free, by being brought within that State, is entitled to

his liberty, though brought into the county of Washington, which was ceded by Maryland, from the county of Alexandria, which was ceded by Virginia, and though, by the law of Maryland, the owner could not directly manumit the slave, who was over forty-five years of age. *Rhodes v. Bell*, 152.

DUE DILIGENCE.

BILLS OF EXCHANGE, &c. 2. 5. 6 ; COLLATERAL SECURITY.

EJECTMENT.

JUDGMENT, &c.

ENTRY.

PUBLIC LANDS, 1. 2. 5. 7. 8.

EQUITY.

1. A decree having been made for a sale of real property conveyed to a trustee to secure payment of a debt, a bill does not lie to restrain the sale on account of a claim to set-off an independent debt, no peculiar equity; such as the insolvency of the debtor, the plaintiff in the first suit, having intervened. *Dade v. Irwin*, 146.
2. Courts of equity do not take jurisdiction to compel offsets of unconnected debts, generally ; there must be some special ground for the relief, such as mutual credit on the faith of the debts. *Ib.*
3. A court of equity will not interfere to compel an offset of a stale and suspicious claim. *Ib.*

COURTS OF THE UNITED STATES, 14 ; EXCEPTIONS, 5. 6 ; JUDGMENT, &c. ; MULTIFARIOUSNESS ; PUBLIC LANDS, 6. 12. 18 ; TRUST ; WILL ; WRIT OF ERROR, 2.

ESTOPPEL.

GUARANTEE, 3 ; HEIRS.

EVIDENCE.

1. Though a refusal to produce books which are in a party's possession will warrant a jury in making all fair intendments in favor of the secondary evidence which is thus let in, yet this refusal is not an independent element, from which any thing can be inferred as to the point which was sought to be proved by the books, if produced. *Hanson v. Eustace's Lessee*, 249.
2. Where a witness states facts, and his inferences, it is proper to instruct the jury that they must determine from the facts whether the inferences are correct. *Walker v. Bank of Washington*, 289.

BILLS OF EXCHANGE, &c. 5. 13 ; EXECUTION, 2 ; JURISDICTION, 3 ; LIBEL, 8 ; PUBLIC LANDS, 16 ; REVENUE LAWS, 4. 11. 12 ; SHIPS, &c. 2.

EXCEPTIONS.

1. The court is not bound to give a modified instruction, different in substance from what is requested ; and if an instruction be not substantially correct, in reference to the evidence, in the terms in which it is prayed for, its refusal is not error. *Catts v. Phalen*, 142.
2. The court cannot give an instruction which makes the case turn on one point only, when there are other grounds necessary to be passed upon by the jury ; nor one which assumes as true a controverted fact. *Adams v. Roberts*, 187.
3. A refusal to give an instruction not applicable to the evidence, is not error. *Rhett v. Poe*, 167.

4. A naked statement on the record that the reading of a deposition, or copy of a record, was objected to, without disclosing the nature or ground of the objection, is nugatory and wholly ineffectual in a court of error. *Camden v. Doremus*, 535.
5. Though exceptions were taken to the rulings of the circuit court, on the trial of a feigned issue out of chancery, in a case pending in that court, yet this court cannot pass on those exceptions, unless they were adjudicated upon by the circuit court. *Brockett v. Brockett*, 602.
6. If a master's report is not excepted to, as required by the 73d chancery rule, no objection to any of its items can be taken in this court. *Ib.*

CERTIORARI; EVIDENCE, 2.

EXECUTION.

1. The marshal cannot receive depreciated currency in satisfaction of an execution; and if he returns that he has done so, the return may be quashed on motion, and an alias execution issued upon the judgment. *Griffin v. Thompson*, 110.
2. If the creditor assents to the receipt by the marshal of depreciated bank-notes in satisfaction of an execution, he is bound thereby, and his assent may be presumed from lapse of time and other circumstances. *Buckhannan v. Timin*, 112.
3. Under the 3d section of the act of Indiana, of February 4, 1841, the sheriff had not power to sell the fee on execution, without first offering the rents and profits for sale; and the purchaser was bound to take notice of his omission to do so. *Gantly's Lessee v. Ewing*, 608.

CONSTITUTIONAL LAW, 1; COURTS OF THE UNITED STATES, 15-17. 22; LIEN, 2;
MARSHAL; POOR DEBTOR; SUPERSEDEAS.

EXECUTORS AND ADMINISTRATORS.

An administrator, who is indorsee of a note, may elect to sue thereon as administrator, or in his own right. *Matheson's Administrators v. Grant's Administrator*, 114.

PLEADING.

FACTOR.

1. A consignee, who has sold merchandise of the consignor, and received its proceeds, but who has accepted bills drawn against those proceeds, which are not yet at maturity, or are in the hands of third persons, for value, cannot be sued by the consignor for those proceeds. *Black v. Zacharie*, 527.

BANKRUPT, 2.

FIDEI COMMISSA.

TRUST, 1.

FINAL PROCESS.

COURTS OF THE UNITED STATES, 15-17.

FLORIDA.

COURTS OF THE UNITED STATES, 13; PUBLIC LANDS, 14. 15. 20. 21.

FORFEITURE.

PIRACY; REVENUE LAWS, 3-12; SHIPS, &c. 4.

FRANCE.

COURTS OF THE UNITED STATES, 11. 12; PUBLIC LANDS, 25.

FRAUD.

MONEY HAD AND RECEIVED ; SALE, 1 ; WILL, 3.

GRANT.

PUBLIC LANDS, 17.

GUARANTEE.

1. A letter of guarantee is to receive a fair and reasonable interpretation, so as to obtain its objects, and not a nice or technical construction. *Lawrence v. McCalmont*, 178.
2. A letter, held to be a continuing guarantee, and to import a future consideration. *Ib.*
3. If a letter of guarantee acknowledge the receipt of one dollar, as a consideration, the guarantor is estopped to deny the existence of that consideration, and it is sufficient to support the promise. *Ib.*
4. It is a question of fact whether the guarantor had reasonable notice of the failure of the principal debtor to pay. *Ib.*

BILLS OF EXCHANGE, &c. 4.

HABEAS CORPUS.

COURTS OF THE UNITED STATES, 1. 2.

HEIRS.

Heirs are not estopped by a warranty of their ancestor from claiming the property by purchase, but only by descent. *Oliver v. Piatt*, 479.

WILL, 3.

HUSBAND AND WIFE.

DEVISE, &c. 5.

IMPRISONMENT FOR DEBT.

POOR DEBTOR.

INDIANA.

EXECUTION, 3.

INFANT.

MONEY HAD AND RECEIVED.

INJUNCTION.

EQUITY ; PUBLIC LANDS, 10.

INSOLVENT.

POOR DEBTOR.

INTEREST.

COURTS OF THE UNITED STATES, 4 ; DAMAGES.

INTERNATIONAL LAW.

PIRACY, 2.

JEOPARDS, STATUTE OF.

AMENDMENT.

JUDGMENT AND DECREE.

A decree of a court of equity declaring that the complainant is the equitable owner of land, and ordering the defendant to convey it, though in part executed by a writ of *habere facias*, putting the complainant in possession, does not confer a legal title, and is not a bar to an action of ejectment. *Hickey's Lessee v. Stewart*, 627.

AMENDMENT; APPEAL, 1. 3; BANKRUPT, 5; COURTS OF THE UNITED STATES, 9 16. 17; JURISDICTION, 3; PUBLIC LANDS, 6. 13. 15; SALE, 2; TRUST, 5. 6; WRIT OF ERROR, 4.

JURISDICTION.

1. What is jurisdiction, defined. *Grignon's Lessee v. Astor*, 125.
2. What are inferior courts, of limited and special jurisdiction. *Ib.*
3. Where a county court had jurisdiction to order a sale of a decedent's estate, on the representation and finding of certain facts, and the record showed that a petition was presented and the order made. *Held*, that the granting of the license was a binding adjudication that all facts necessary to give jurisdiction, as well as to warrant the license, existed, and that the record was conclusive evidence thereof. *Grignon's Lessee v. Astor*, 125.

PUBLIC LANDS, 13-15.

JURY.

BILLS OF EXCHANGE, 6; EVIDENCE; GUARANTEE, 4; REVENUE LAWS, 5; USURY, 2.

KENTUCKY.

DEED; LIEN, 2; PUBLIC LANDS, 6-8.

LAPSE OF TIME.

EXECUTION, 2; TRUST, 2.

LARCENY.

BOND, 2.

LAW AND FACT.

BILLS OF EXCHANGE, &c. 6; GUARANTEE, 4; REVENUE LAWS, 5; USURY, 2.

LEAD MINES.

PUBLIC LANDS, 9. 10.

LEX LOCI

CORPORATION, 2.

LIBEL.

1. Though a communication be privileged, if it be malicious, an action lies; but the plaintiff must aver and prove actual malice. *White v. Nicholls*, 439.
2. It is not necessary to aver, in the declaration, the facts constituting malice; it is enough to allege the writing was maliciously published. *Ib.*
3. Want of probable cause will authorize the inference of malice. *Ib.*
4. A letter to the President of the United States, containing charges against one in public office under the executive government, if false and malicious, is actionable. *Ib.*

LICENSE.

JURISDICTION, 3.

LIEN.

1. A lien upon certificates of stock cannot arise from a breach of trust. *Randel v. Brown*, 157.
2. In Kentucky, the delivery of a *fi. fa.* to the sheriff, creates a lien on the debtor's lands, which is as valid before as after a levy. *Waller's Lessee v. Best*, 325.

BANKRUPT, 4. 5.

LIMITATIONS OF SUITS.

PUBLIC LANDS, 7. 8. 12. 14; TENANTS IN COMMON; TRUST, 2.

LOTTERY.

MONEY HAD AND RECEIVED.

LOUISIANA.

1. Though by the act of February 20, 1811, (2 Stats. at Large, 641,) certain restrictions were imposed on the convention which was to form the constitution of Louisiana, in respect to what that constitution should contain, yet when by the act of April 8, 1812, (2 Stats. at Large, 701,) Louisiana was admitted into the Union, "on an equal footing with the original States," congress must be considered to have been satisfied those restrictions had been observed, in forming the constitution, and it is no longer a question under any law of the United States, whether an individual has been injured by a violation of a right intended to be secured by those restrictions. *Permoli v. First Municipality of New Orleans*, 561.
2. The act of March 2, 1805, (2 Stats. at Large, 322,) granted to the inhabitants of the territory of Orleans, the rights secured to the people of the Northwestern Territory by the ordinance of 1787, so far as the same had been conferred on the people of the Mississippi territory; but the political right to religious liberty, provided for in that ordinance and in this act of congress, ceased to depend thereon, when the State was admitted to the Union. If it existed, it was under the constitution of the State alone. *Ib.*

COURTS OF THE UNITED STATES, 11. 12; PUBLIC LANDS, 17. 20. 21. 25. 26;
TRUST, 1; WILL; WRIT OF ERROR, 2. 3.

MANDAMUS.

ACTION, 2.

MANDATE.

APPEAL, 1; COURTS OF THE UNITED STATES, 13.

MARINE CORPS.

NAVY, &c.

MARSHAL.

1. Though a marshal be out of office, he must complete a levy which he has begun, and is subject to all legal remedies in favor of the execution creditor. *McFarland v. Gwin*, 614.
2. If a marshal receive bank-notes in satisfaction of an execution, he is liable to the creditor for the amount in gold or silver. *Gwin v. Breedlove*, 16.

COURTS OF THE UNITED STATES, 16. 17; EXECUTION, 1. 2.

MARYLAND.

BILLS OF EXCHANGE, &c. 10; DEVISE, &c. 1; DISTRICT OF COLUMBIA.

MASTER.

SHIPS, &c.

MASTER IN CHANCERY.

EXCEPTIONS, 6.

MICHIGAN.

TAXES.

MISJOINDER OF COURTS.

AMENDMENT.

MISSISSIPPI.

BILLS OF EXCHANGE, &c. 8; COURTS OF THE UNITED STATES, 16. 17. 20;
POOR DEBTOR, 2; PUBLIC LANDS, 18.

MOBILE.

PUBLIC LANDS, 21.

MONEY HAD AND RECEIVED.

Where the defendant was employed by the plaintiffs to draw an illegal lottery, and fraudulently induced the plaintiffs to believe that a certain ticket had drawn a prize, and to pay the amount of such prize to one who held the ticket and received the money for the defendant, — *Held*, that the illegality of the lottery was not a defence to an action for money had and received; and that, if the defendant was of age when he obtained the money, infancy was not a defence to the action. *Catts v. Phalen*, 142.

AGENT.

MORTGAGE.

BANKRUPT, 4. 5; CONSTITUTIONAL LAW, 2; TRUST, 6.

MORTMAIN.

CHARITY.

MULTIFARIOUSNESS.

1. No abstract rule as to what is multifariousness can be laid down. *Oliver v. Piatt*, 475.
2. If entire justice cannot so conveniently be done against the same defendants, without uniting different subjects, they may be united in a bill. *Ib.*
3. Though the court can, *sua sponte*, refuse to proceed at the hearing, because of multifariousness, the defendant can object on account of it, only by plea, or answer, or demurrer. *Ib.*
4. It is not practicable to define multifariousness; each case must be examined in reference to the leading principles, not to subject one party to a litigation between others in which he has no interest, and not to allow an unnecessary multiplicity of suits. *Gaines v. Chew*, 286.
5. A bill which claims different parcels of land, as devisee, or heir at law, and shows that each defendant claims in severalty as a purchaser under a will, which the bill impeaches, and the effect of which to devise any of the lands, the bill controverts, is

not multifarious, though the case of each defendant who may claim protection as a *bonâ fide* purchaser without notice, is distinct from the cases of all the others. *Gaines v. Chew*, 236.

NAVIGABLE WATERS.

SEA.

NAVY OF THE UNITED STATES.

1. A brevet field-officer of the marine corps is upon the same footing, in respect to what constitutes his title to pay and emoluments, as a brevet field-officer of infantry of the same grade. *United States v. Freeman*, 548.
2. The provision of the 1st section of the act of April 16, 1818, (3 Stats. at Large, 427,) respecting brevet pay and rations, is not repealed by the act of June 30, 1834, (4 Stats. at Large, 712.) *Ib.*
3. The 5th section of the act of June 30, 1834, (4 Stats. at Large, 713,) does repeal the joint resolution of the two houses of congress, of May 25, 1832, respecting the pay and emoluments of the marine corps. *Ib.*
4. Under what circumstances a marine officer is entitled to double rations. *Ib.*

NOTARY.

BILLS OF EXCHANGE, &c. 8. 9.

NOTICE.

A party, put by the circumstances on inquiry as to a fact, is affected with constructive notice thereof. *Oliver v. Piatt*, 479.

BILLS OF EXCHANGE, &c. 1-4. 6-9 ; COLLATERAL SECURITY ; EXECUTION, 8 ;
GUARANTEE, 4.

OFFICER.

ACTION, 1 ; BOND, 2 ; NAVY, &c.

OHIO.

CUMBERLAND ROAD, 2.

ORDINANCE OF 1787.

The effect of the ordinance of 1787 discussed. *Pollard v. Hagan*, 391.

LOUISIANA, 2.

PARTNERSHIP.

BILLS OF EXCHANGE, &c. 3. 13 ; DEVISE, &c. 2. 3.

PARTIES.

BOND, 1 ; TRUST, 6.

PATENT.

PUBLIC LANDS, 3. 4. 12. 22-24 ; TAXES.

PAYMENT.

COLLATERAL SECURITY ; EXECUTION, 1. 2.

PENAL LAW.

BALTIMORE AND OHIO RAILROAD COMPANY ; REVENUE LAWS, 3.

PENNSYLVANIA.

CHARITY; CUMBERLAND ROAD, 1.

PIRACY.

1. Under the 4th section of the act of March 3, 1819, (3 Stats. at Large, 513,) any piratical aggression subjects the vessel to forfeiture, though not made *causa lucri*, and though the owners were entirely innocent, and the vessel was armed for a lawful purpose, and sailed on a lawful voyage. *Harmony v. United States*, 91.
2. Under the act of 1819, the cargo, belonging to an innocent owner, is not forfeited; and this act shows that the policy of this country does not require such a forfeiture under the law of nations. *Ib.*

PLEADING.

1. Whether in Alabama a *profert* of letters of administration is necessary, *quære*; but if so, the want of it is cured by a verdict. *Matheson's Administrators v. Grant's Administrator*, 114.
2. The effect of a demurrer reaches no further back than proceedings *in fieri*. *Dickson v. Wilkinson*, 287.
3. A *fi. fa.* having issued, to be levied of the assets of the testator, and been returned *nulla bona*, upon suggestion that assets had come, &c., a *scire facias* issued, and the administrator suffered a judgment by default to be levied of the goods, &c., in his hands to be administered; upon this judgment a *fi. fa.* issued and was returned *nulla bona*. Thereupon, another *scire facias* issued to have judgment *de bonis propriis*. Held, — that, on a demurrer taken to pleas to this last *scire facias*, the defendant could not avail himself of the want of an averment in the first *scire facias*, that goods, &c., had come to the hands of the defendant to be administered, since the original judgment. *Ib.*

AMENDMENT; LIBEL, 1. 2; MULTIFARIOUSNESS; REVENUE LAWS, 10.

PLEDGE.

COLLATERAL SECURITY.

POSTMASTER-GENERAL.

DAMAGES.

POOR DEBTOR.

1. The discharge of a debtor committed on an execution out of a circuit court of the United States, for non-payment of prison fees, under the authority of a state law or by a state officer under a state insolvent law was not legal. *McNutt v. Bland*, 1.
2. The act of the State of Mississippi, granting the use of its jails to the United States, was intended to be in conformity with the resolution of congress on that subject, of September 23, 1789, (1 Stats. at Large, 96,) and consequently prisoners of the United States could be discharged only by due course of the laws of the United States. *McNutt v. Bland*, 1.

PRACTICE.

AMENDMENT; CITATION; COURTS OF THE UNITED STATES, 14–17; EXCEPTIONS, 6; EXECUTION, 1; MULTIFARIOUSNESS, 3; SUPERSEDEAS; WRIT OF ERROR.

PROBABLE CAUSE.

LIBEL, 3; REVENUE LAWS, 5. 11.

PROBATE COURT.

WILL.

PROHIBITION.

COURTS OF THE UNITED STATES, 3.

PROTEST.

BILLS OF EXCHANGE, &c. 8; REVENUE LAWS, 13.

PUBLIC LANDS.

1. If it is practicable, by a reasonable construction of an entry, to include the whole quantity of land called for, it is to be included. *Croghan's Lessee v. Nelson*, 373.
2. The call to run one line parallel to another, if repugnant to the call for the quantity, may be disregarded, if the other calls, and that for quantity, sufficiently identify the land. *Ib.*
3. Under the 1st section of the act of April 24, 1820, (3 Stats. at Large, 566,) and the instructions of the secretary of the treasury, the surveyor-general was bound to divide fractional sections into as many half-quarter sections as practicable, by north and south, or east or west lines, so as to preserve the most compact forms; and if this be not done, the register can not lawfully sell the land, and the act of the surveyor general, in making a different division, is void. *Brown's Lessee v. Clements*, 580.
4. A patent which, by reason of such a void survey and division, appropriates to one preëmption claim what belongs to another, is void, as against the owner of the latter claim. *Ib.*
5. A law of Virginia, passed in 1779, for opening a land-office, &c., contained a clause that no entry, or location of land, should be admitted within the country and limits of the Cherokee Indians. *Held*, that the tract west of the Tennessee River was not then within the limits of the country belonging to those Indians. *Kinney v. Clark*, 40.
6. The title to lands in Virginia, Kentucky, and Tennessee, could be tried under a *caveat*, and the judgment bound those who had a claim to an equitable title under one of the parties. *Ib.*
7. The courts of Kentucky having decided that an entry under a military warrant was necessary to give title, those claiming under such warrants, without entry, are barred by the act of limitations of Kentucky of seven years; for though that act does not bar those who claim by legislative grant, persons claiming under military warrants only obtained inchoate, and not complete titles from the legislature, and so are not within the exception. *Ib.*
8. Though the Kentucky act of 1809 could not have complete operation west of the Tennessee when it was passed, yet it did have such operation as soon as the restrictions imposed by treaty were removed. *Kinney v. Clark*, 40.
9. In the districts made by the act of June 26, 1834, (4 Stats. at Large, 686,) lead-mine lands were not subjected to sale, nor liable to be located on by the preëmption rights. *United States v. Gear*, 328.
10. Digging lead ore from the public lands is such waste as entitles the United States to an injunction. *Ib.*
11. The first appropriation of the land, under a location of a New Madrid certificate, is the return of the survey, by the surveyor, with a notice of location, to the office of the recorder, but the location could be made on lands before they were offered at public sale. *Barry v. Gamble*, 279.

12. Where there were conflicting titles to the same land, one being a location under a New Madrid certificate, made in 1818, and confirmed by congress in 1822 and patented in 1827, and the other being an inchoate Spanish title, barred by failure to file notice of the claim pursuant to the act of March 2, 1805, (2 Stats. at Large, 324,) but the bar removed by the act of May, 26, 1824, (4 Stats. at Large, 52,) and the title confirmed by a decree of this court after the patent issued for the first mentioned title, it was *held*, that as the Spanish title was barred as against the United States, from 1808 to 1824, they might prescribe conditions for removing the bar; that they had done so; and that, by force of a limitation in the acts of 1824 and 1828, (4 Stats. at Large, 298,) the title acquired under the patent in 1827, and the equitable title which preceded the patent, were protected. *Barry v. Gamble*, 279.
13. The supreme court of Mississippi had not jurisdiction to examine and declare the validity of an inchoate Spanish title, and its proceedings in that behalf were merely void. *Hickey's Lessee v. Stewart*, 627.
14. The courts of Florida had not jurisdiction to receive a petition for the confirmation of a private land claim after May 26, 1831. *United States v. Marvin*, 567.
15. This court having made a decree, affirming a decree of the court below for a specific tract of land, ascertained by a survey made under the order of the court below, under the act of 1824, (4 Stats. at Large, 52,) applied to Florida titles by the act of May 23, 1828, § 6, (4 Stats. at Large, 285,) the latter court could not, on petition, correct any alleged mistake in that survey. *Chaires v. United States*, 565.
16. Though a document, purporting to be a return of a Spanish survey, had been recognized by the Spanish colonial authorities as genuine, and is therefore to be deemed so, *primâ facie*, yet it may be shown to be antedated and forged. *United States v. King*, 640.
17. A Spanish grant, which did not contain any description by which the land could be located, and was connected with no survey, did not create any private property, in any part of the public domain; such a title was not confirmed by the treaty of cession of Louisiana. *Ib.*
18. An equitable Spanish title, not confirmed by the United States, cannot prevail against a legal title acquired from the United States. *Ib.*
19. The act of April 29, 1816, § 1, (3 Stats. at Large, 329,) did not confirm the title to a quantity of land exceeding one league square. *Ib.*
20. It is the settled doctrine of this court, that the country west of the Perdido River was not acquired from Spain as part of West Florida. *Pollard's Lessee v. Files*, 220.
21. But though we hold the Spanish authorities could not make valid titles to lands there, after the acquisition of Louisiana by the United States, yet incipient titles acquired from those authorities might be, and to some extent have been, respected and confirmed by the United States; and such a title of the plaintiff in error, existing when the act of congress of 1824, (4 Stats. at Large, 66,) granted certain lands to the city of Mobile, it was within the exceptions of that act; and the subsequent confirmation, by congress, of the plaintiff's title, made it valid. *Pollard's Lessee v. Files*, 220.
22. An act of congress, confirming a title, makes a legal title without a patent. *Grignon's Lessee v. Astor*, 125.
23. An act of congress confirming titles, excepted cases where the land had previously been located by any other person than the confirmer, under any law of the United States, or had been surveyed and sold by the United States. *Held*, that a location made on land reserved from sale by an act of congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmer was made perfect by the act of confirmation, and without any patent, as against the prior pat-

ent, which was simply void ; and this valid legal title enured at once to the benefit of an assignee of the confirmer. *Stodlard v. Chambers*, 119.

24. A confirmation, by act of congress of July 4, 1836, (5 Stats. at Large, 126,) held to make a good legal title, without a patent. *Chouteau v. Eckhart*, 136.

25. Incomplete Spanish titles were not rendered complete by the treaty by which Louisiana was acquired ; the government of the United States succeeded to the powers and duties of the crown of Spain as to confirmations of such titles, and where there were two adverse claimants, might select between them, and make a perfect title to one and wholly exclude the other. *Ib.*

26. The titles to village lots and commons in upper Louisiana described. *Ib.*

COURTS OF THE UNITED STATES, 10-13 ; SALE, 1 ; TAXES ; TREATY

RECEIVER OF PUBLIC MONEYS.

BOND, 2.

RECORD.

AMENDMENT ; CERTIORARI ; JURISDICTION, 3 ; WRIT OF ERROR, 3.

REVENUE LAWS.

1. Under the tariff act of March 2, 1833, (4 Stats. at Large, 629,) the government was authorized to collect duties upon goods imported after June 30, 1842, and the regulations for ascertaining the amount of duties provided by existing laws, are to be applied, so far as they are applicable, to the collection of duties under this act, though the place in reference to which the value of goods was to be appraised, is changed from the foreign country to the port of importation, and no corresponding change is made in the instrumentalities for ascertaining the home value. *Aldridge v. Williams*, 268.

2. A duty on "cotton bagging" can be levied only on articles known as such in commerce, when the act imposing the duty was passed. *Curtis v. Martin*, 322.

3. Revenue laws, which impose forfeitures for fraud, are not technically penal, so as to call for a strict construction ; they should be construed so as effectually to accomplish the intentions of their makers. *Taylor v. United States*, 382.

4. Circumstances which may throw the *onus probandi* on the claimants. *Ib.*

5. Under the 71st section of the collection act of 1799, (1 Stats. at Large, 678,) the judge, and not the jury, determines whether probable cause for the prosecution has been shown. *Ib.*

6. The 68th section of the collection act of 1799, (1 Stats. at Large, 677,) reaches cases where, by a fraudulent undervaluation, less than the legal amount of duties has been paid, as well as where none have been paid. *Ib.*

7. Under the collection act of March 2, 1799, (1 Stats. at Large, 627,) every officer of the customs is empowered to make a seizure, in any district. *Ib.*

8. If the government institute proceedings to enforce a forfeiture, it is wholly immaterial who made the seizure, or whether it was regular or not, or whether the cause assigned for seizing is the same for which a condemnation is sought. *Taylor v. United States*, 382.

9. 3 Wheat. 246, 16 P. 342, affirmed. *Ib.*

10. The regularity of the seizure is not in issue upon pleadings addressed to the merits ; it requires a plea in abatement to put it in issue. *Ib.*

11. Persons acting as agents of the government, are witnesses *ex necessitate* as to the facts attending the seizure, and they have no interest in the forfeiture ; though interested in obtaining a certificate of probable cause, yet, where they act under a search warrant, this interest is too remote to disqualify them, and they are competent to testify on the trial of the merits, the question of probable cause being no part of the issue. *Ib.*

12. Other invoices, and the conduct of the importers as to other importations, may be admitted for the purpose of showing a scheme to defraud the United States. *Taylor v. United States*, 382.
13. A verbal protest against the illegal exaction of duties is sufficient. *Swartwout v. Gihon*, 324.

ACTION, 3.

REVIEW.

COURTS OF THE UNITED STATES, 9.

SALE.

1. An agreement by two land companies to appoint a common agent to buy for their joint and several account at a public sale of the public lands, is not a fraud on the United States. *Oliver v. Piatt*, 479.
2. A trustee, appointed by the chancellor of Maryland to sell one parcel of land, sold that, and subsequently sold another parcel, which was not embraced in the decree, and reported the latter sale to the court, and it was confirmed; *Held*, that there was no authority to make the sale, and that the order of confirmation did not render it valid. *Shriver's Lessee v. Lynn*, 25.

CONSTITUTIONAL LAW, 1. 2; CORPORATION; EQUITY; EXECUTION, 3; JURISDICTION, 3; TRUST, 6.

SALVAGE.

SHIPS, &c. 1-3.

SCIRE FACIAS.

PLEADING, 3.

SEA.

The State of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters within the limits of the State, not previously granted. *Pollard v. Hagan*, 391.

SEISIN AND DISSEISIN.

TENANTS IN COMMON.

SEIZURE.

REVENUE LAWS, 7-11.

SET-OFF.

AGENT, 2; EQUITY.

SHERIFF.

COURTS OF THE UNITED STATES, 16. 17. 20; EXECUTION, 3.

SHIPS AND SHIPPING.

1. An agreement of consortship, made by the masters of two vessels employed in the business of salvage, must be deemed to be made by the masters in behalf of the owners and crew, as well as themselves, and, in the absence of a stipulation to that effect, is not dissolved by a change of one of the masters. *Andrews v. Wall*, 555.
2. The answer to a libel is not evidence of a stipulation to that effect. *Ib.*
3. The admiralty has jurisdiction over such a contract of consortship, as a maritime contract. *Ib.*

4. By the general maritime law, as well as by the legislation of particular countries, vessels are made responsible for the unlawful acts of their masters and crews, and this extends even to forfeitures, by positive law. *Harmony v. United States*, 91.

PIRACY.

SLAVE.

DISTRICT OF COLUMBIA.

SPAIN.

COURTS OF THE UNITED STATES, 10; PUBLIC LANDS, 11-21. 25. 26.

STATE.

COURTS OF THE UNITED STATES, 15. 18. 21; POOR DEBTOR.

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SUPERSEDEAS.

If an execution has been issued by the circuit court, in a case brought here by writ

of error, where the plaintiff in error was entitled to a *supersedeas*, this court will issue a writ of *supersedeas*. *Stockton v. Bishop*, 38.

COURTS OF THE UNITED STATES, 22.

TAXES.

By the law of Michigan, lands, for which patent certificates had issued, were liable to taxation, at their full value, as the property of the purchaser, though no patent had been issued; and such a law is valid under the constitution and laws of the United States. *Carroll v. Safford*, 509.

CONSTITUTIONAL LAW, 3. 4. .

TENANTS IN COMMON.

Though the entry and possession of one tenant in common is, generally, the entry and possession of all the tenants, yet if one enter on part of the land, under a partition, claiming that part in severalty, his possession is adverse to the co-tenants, and though the partition be invalid, the statute of limitations runs against the co-tenants. *Clymer's Lessee v. Dawkins*, 596.

TENNESSEE.

PUBLIC LANDS, 6.

TOLL.

CUMBERLAND ROAD.

TREATY.

Under the treaty between the United States and the Creek tribe of Indians of March 24, 1832, (7 Stats. at Large, 866,) it was *Held*: 1. That the twenty sections of land to be selected by the President for the orphan children of the tribe, were not to be taken from the lands reserved for the tribe by the preceding stipulations of the treaty. 2. That a grandmother, with whom some of her grandchildren resided, was the head of a family, and entitled to a half section of land, as such. *Ladiga v. Roland*, 211.

COURTS OF THE UNITED STATES, 11 12; PUBLIC LANDS, 8. 17. 21. 25.

TRUST.

1. Though *fidei commissa* are abolished in Louisiana, this does not prevent a part of the United States, administering equity there, from holding a wrongdoer, a trustee for the party justly entitled, by way of remedy for the wrong. *Gaines v. Chew* 236.
2. Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust; and time begins to run against a trust only from the date of its open disavowal. *Cover v. Piatt*, 479.
3. Even unjustifiable delay and gross inattention on the part of some of the *cestas* *trust*, furnishes no bar to relief against persons conversant with the trust. *Ib.*
4. The option of the *cestui que trust* to follow the trust property into the hands of one not a *bond fide* purchaser, for value, without notice, or to take its proceeds, cannot be controlled by a repurchase by the trustee, who committed a breach of trust. *Ib.*
5. Where a creditor of a land company obtained a judgment at law against the company, in a State in which they did not reside, without notice, and levied on land there, in which the company had only an equitable interest, and the trustee of the company who held the means of obtaining the legal title, gave those means to the

creditor, without notice to the *cestuis que trust*. *Held*, that a court of equity would not consider such a title valid. *Oliver v. Piatt*, 479.

6. A decree of sale, in a suit to foreclose a mortgage, in which known *cestuis que trust* are not joined, the only defendant being the trustee who made the mortgage on account of the known *cestuis que trust*, does not bind the title of the latter. *Ib.* BANKRUPT, 1-3; CHARITY; COURTS OF THE UNITED STATES, 19. 21; LIEN, 1.

UNITED STATES.

BILLS OF EXCHANGE, &c. 12; CUMBERLAND ROAD; POOR DEBTOR; PUBLIC LANDS, 10. 12. 18. 25; SALE 1.

USURY.

1. If a bank engage to discount a note, and receive the note and allow the maker to draw checks against the proceeds of the discount, it is not usury to treat the loan as made on the day when the note was received, although the proceeds of the discount were not placed to the credit of the maker on the books of the banks until a subsequent day, because the maker did not furnish to the bank till then, certain collateral security for the loan, which he had agreed to give. *Walker v. Bank of Washington*, 289.
2. If the question of usury depends on written papers, it is for the court to determine it. *Ib.*
3. A new security, given to the lender, for the same usurious loan, is void. *Ib.*

VERDICT.

AMENDMENT; PLEADING, 1.

VIRGINIA.

DEED; DISTRICT OF COLUMBIA; PUBLIC LANDS, 5. 6.

WAIVER.

If the defendant in error appears during two terms, and moves for a *certiorari* to complete the record, he cannot afterwards object that the citation was not regular. *McDonogh v. Millaudon*, 604.

WARRANTY.

HEIRS.

WASTE.

PUBLIC LANDS, 10.

WILL.

1. Both under the local law of Louisiana and the chancery law as administered in the courts of the United States, when a will has been admitted to probate, a claim that it was revoked by a subsequent will, and that the latter alone is operative, cannot be made, effectually, so as to set up a title under the latter will, save in a court of probate. *Gaines v. Chew*, 236.
2. Perhaps under some circumstances equity may interpose to compel a party to allow the revocation of a probate and the substitution of another will by the court of probate. *Ib.*
3. But in Louisiana, in an action to try a title to land, the probate of a will may be drawn in question collaterally, by an heir at law, and if the parties are numerous

and the controversy complicated, and discovery is wanted and can be had, equity would give relief, especially in a case of fraud. *Gaines v. Chew*, 236.

DEVISE, &c.

WITNESS.

The decision in 6 P. 51, and 8 P. 12, that a party to a negotiable instrument cannot be a witness to invalidate it, affirmed. *Henderson v. Anderson*, 293.

COURTS OF THE UNITED STATES, 2; REVENUE LAWS, 11.

WRIT OF ERROR.

1. A writ of error cannot be allowed on the application of the friends of a party, without authority from himself. *Ex parte Dorr*, 320.
2. The jurisdiction of the circuit court in Louisiana, in cases at law and in equity, is distinct, and if a proceeding, which belongs to the latter jurisdiction, is brought up by a writ of error, the writ must be dismissed. *McCollum v. Eager*, 32.
3. If the record of an action at law in Louisiana contains the evidence, but no bill of exceptions, and nothing raising any points of law distinct from the evidence, this court cannot revise the judgment on a writ of error. *Minor v. Tillotson*, 149.
4. If one defendant in error die, before the term begins, and the cause of action survives, the death may be suggested and judgment taken against the survivor. *McNutt v. Bland*, 1.

AMENDMENT; BOND, 1; CERTIORARI; CITATION; COURTS OF THE UNITED STATES, 5-7; SUPERSEDEAS; WAIVER.

